Central Law Journal.

ST. LOUIS, MO., JANUARY 17, 1896.

In 1891 the legislature of Kansas passed an act "to prohibit the editing, publishing, circulating, disseminating and selling of certain classes of newspapers and other publications," * * * "devoted largely to the publication of scandals, lechery, assignations, intrigues between men and women, and immoral conduct of persons." In a recent *habeas corpus* case—*In re* Banks—before the Supreme Court of Kansas, the act was held constitutional and valid, and it was also decided that in order that a publication may fall within the terms of said act, as being "devoted largely to the publication of scandals, lechery, assignations, intrigues between men and women, and immoral conduct of persons," it is not necessary that more than half the columns, or any other definite number, be filled with such items. It is sufficient if such items are a prominent feature, and especially characteristic of the publication. The contention was made on behalf of the petitioner, who had been arrested on the charge of having sold a Sunday newspaper which infringed against the provisions and spirit of the statute, that the act was void because in contravention of the bill of rights. But the court thought otherwise, holding that the act was not passed to prevent the publication of libels, nor to suppress papers indulging in such publications, but to prevent the publication and sale of newspapers especially devoted to the publication of scandals and accounts of lecherous and immoral conduct. "Without doubt," they say, "a newspaper, the most prominent feature of which is items detailing the immoral conduct of individuals, spreading out to public view an unsavory mass of corruption and moral degradation, is calculated to taint the social atmosphere, and, by describing in detail the means resorted to by immoral persons to gratify their propensities, tends especially to corrupt the morals of the young and lead them into vicious paths and immoral acts. We entertain no doubt that the legislature has power to suppress this class of publications, without in any manner violating the constitution."

In many of the Southern States the legislature has wisely provided for the separation of white and colored passengers on railroad trains, by the passage of what is known as "separate coach laws." In the transportation of passengers, prior to the enactment of these laws, the frequent disturbances arising between the two races, resulting often in serious injuries being inflicted by the one on the other, and the danger to other passengers, led to their enactment as a police regulation, in order to prevent, as far as possible, these altercations upon railroad trains, and to check the disposition of those of the dominant race to offend and humiliate those who were entitled to the protection of the law. No discrimination is made by the law in favor of the one race or the other. Each have the same facilities as to transportation, as to conveniences and accommodations, in the coach to which they are assigned. In order to make this law the more effectual, heavy penalties are imposed on the railroad companies for not having separate coaches, and upon the conductors, or those in charge of trains, for not assigning to each white or colored passenger their respective compartment.

An interesting phase of this law came up in the recent Kentucky case of Quinn v. Louisville & N. R. Co., 32 S. W. Rep. 742. There it appeared that a conductor of one of defendant's trains, whereon were separate coaches for white and colored persons, as provided by the Kentucky statute, allowed an intoxicated white passenger to enter and remain in a coach reserved for colored persons, where he created a disturbance, was guilty of obscene language and otherwise maltreated a colored passenger. It was held that the railroad company was responsible for his conduct while there and liable in damages to the passenger. The court stated that while the mere presence of the intruder into the coach for colored persons, with the knowledge of the conductor, would not give to the occupants a cause of action against the corporation, they could not concur with counsel or the court below that the separate coach law has no application to the facts of this case. If, they say, each one of the passengers had been assigned the coach required by the statute, and the white passenger had left his coach, and gone into the coach with these colored people, without the knowledge

of the conductor, while he was attending to his duties in the other cars, and had there abused and insulted the appellant, it is plain no action could be maintained against the company; but when the white passenger is assigned to the cars set apart for those of another race, the company will be held responsible for his bad conduct, affecting the rights of other passengers, although the conductor may be ignorant of what is transpiring; and where the conductor, or those managing the train, knows that one is in the wrong car, it is his duty to expel him, and, by consenting to his remaining, the company becomes responsible for his conduct so long as he does remain. If a contrary rule is applied, and no liability exists on the part of the corporation to the passenger, the separate coach law becomes a dead letter, and those who are entitled to its protection have no means of enforcing its provisions but by an indictment, where a penalty may be adjudged in favor of the State.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW — SELF-INCRIMINATING TESTIMONY.—In Brown v. Walker, 70 Fed. Rep. 46, the United States Circuit Court for the Western District of Pennsylvania, held that the provision in the fifth amendment to the constitution of the United States, against compelling a person in a criminal case to be a witness against himself, is not intended to shield a witness from the infamy or disgrace resulting from incriminating testimony, but only from actual prosecution and punishment. It was further held that the act of congress of February 11, 1893, providing that no person shall be excused from testifying in proceedings under the interstate commerce act on the ground that his testimony may incriminate him, but that no person shall be prosecuted or subjected to penalty for anything concerning which he may testify, does not contravene the provisions of the fifth amendment to the constitution of the United States, since it affords the witness a protection as broad as the constitutional provision. The following is from the opinion of the court:

To our mind it is clear the infamy or disgrace to a witness which may result from disclosures made by him are not matters against which the constitution shields, and that so long as such disclosures do not concern a crime of which he may be convicted, the provision quoted does not apply. But does the act of congress give the petitioner as broad protection as the constitutional provision? Unquestionably it does. It says he "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise." This affords him absolute indemnity against future prosecution for the offense to which the question relates. The act of testifying has, so far as he is concerned, wiped out the crime. It has excepted him from the operation of the law, and, as to him, that which in others is a crime has been expunged from the statute books. If, then, there exists, as to him, no crime, there can be no self-crimination in any testimony he gives, and if there can be no self-crimination, if neither conviction, judgment, nor sentence can directly or indirectly result from his testimony, what need has he for the constitutional provision? For, says Broom (Leg. Max. p. 654), in speaking of the maxim quoted above, "Where, however, the reason for the privilege of the witness or party interrogated ceases, the privilege will cease also; as, if the prosecution to which the witness might be exposed on his liability to a penalty or forfeiture is barred by lapse of time, or if the offense has been pardoned, or the penalty or forfeiture waived"—a doctrine approved, as we have seen above, by Lord Eldon.

In practical effect, the legislative act throws a greater safeguard around the petitioner than the constitutional provision. Before he testified, he could have been charged with a violation of the interstate commerce law, in which case the amendments only protected him against compulsory self-crimination. He was liable to a possible verdict of guilty if the necessary proofs were given, but under the legislative act, when he has testified the law excepts him from its operation, makes that which was before a possible crime a mere matter of indifference, and shields him from subsequent prosecution. The sweeping words of the statute—as broad as human language can make them—afford absolute indemnity to the witness. No crime exists as to him. It is not a pardon—not an act of amnesty. No charge can be made against him, for it is illegal to even prosecute him, viz., "No person shall be prosecuted." To our mind, the constitutional provision in words and purpose is plain. In the Counselman case, 142 U. S. 547, the witness was protected from the manifestly self-criminating answers which would have disclosed facts upon which a prosecution, to which he was still left exposed, could be based. But, owing to the act of 1893, no such consequence can ensue if the present petitioner is made to answer. Such being the case, the constitutional provision does not concern him, and if it does not, the act which compels him to testify is not unconstitutional.

In reaching this conclusion we have given due regard to the case of U. S. v. James, 60 Fed. Rep. 257, where the act was held to be unconstitutional. While we regret to differ from this only federal decision on the matter, we find support for our position in the opinion of the Supreme Court of New Hampshire, in State v. Nowell, 58 N. H. 314, and of the Supreme Court of California, in *Ex parte* Cohen, 38 Pac. Rep. (Cal.) 364.

The prayer of the petitioner to be discharged will therefore be denied, and he will be remanded to the custody of the marshal.

CORPORATIONS — ACTION ON SUBSCRIPTION FOR STOCK.—One of the points decided by the Supreme Court of Georgia in the case of Branch v. Augusta Glass Works, is that where a number of persons sign a written contract, by the terms of which they agree to subscribe to the capital stock of a company to be thereafter incorporated, under a designated name, for the purpose of carrying on a given business,—each subscriber to take the number of shares set opposite to his name, and pay 50 per cent. of his subscription on demand, "and the balance as the directors may direct,"—the corporation, after being duly formed and organized, may maintain in its own name an action upon this contract, against a subscriber thereto, for the amount of his subscription thus made to its capital stock. Upon this point the court says:

It was further insisted that the Augusta Glass Works could not, as a corporation, and in its corporate name, maintain an action upon the contract which formed the basis of the present suit. That contract was in writing, signed by the defendant and several other persons, and was in the following words: "We, the undersigned, do severally agree to subscribe to the capital stock of a company, to be incorporated, and known as the Augusta Glass Works, the amounts set opposite our respective names below. The capital stock is to be not less than ($50,000) fifty thousand dollars, in shares of ($100) one hundred dollars, par value, each. The works are to be located in or near Augusta, Richmond county. Fifty per cent. of the subscriptions hereto are to be payable on demand, and the balance as the directors may direct. The contract is to be binding upon each party hereto when $50,000 has been *bona fide* subscribed, and not before." After some investigation, we are satisfied that the corporation had the legal right to bring and maintain in its own name an action upon this contract, against any subscriber thereto, for the amount of his unpaid subscription thus made to its capital stock. In this conclusion we are supported by a considerable array of respectable authorities, to a few of which we will briefly call attention. Thus, in 1 Spel. Priv. Corp. § 306, it is laid down that where several persons sign a written instrument which involves the formation of a corporation, and the parties have so far progressed with the execution of their agreement as to organize the corporation under it, the corporation immediately becomes a party to the undertaking, by relation, and may sue for the sums promised in such agreement. In Haskell v. Sells, 14 Mo. App. 91, it was said that "an agreement to take shares in a corporation to be formed inures to the benefit of the corporation, when organized in pursuance of the subscription." Bakewell, J., who delivered the opinion of the court in that case, observed that the subscription paper signed by Sells was an unconditional contract to take a certain number of shares, and that this, *prima facie*, constituted him a stockholder, adding: "That there was no corporation in existence at the time the paper was signed is immaterial. The objection that there is no promise in such a case is satisfactorily met by the suggestion that the promise becomes definite and fixed when, in accordance with the expectation of the subscribers, the corporation is effected." A somewhat similar subscription for stock was before the Supreme Court of New Hampshire in the case of Ashuelot Co. v. Hoit, 56 N. H. 548; and it was held "that the corporation, when organized, could maintain a suit against a delinquent subscriber to enforce the collection of its subscription." A corporation was organized in Illinois under a general statute, and the Supreme Court of that State, in Cross v. Mill Co., 17 Ill. 54, held that payments of subscriptions to stock made before the organization of the company could be enforced in an action brought by the company itself after its organization. The same rule is laid down in Railroad Co. v. Gifford, 87 N. Y. 294. And see, also, Hall Co. v. Carey, 116 Mass. 471; Railroad Co. v. Dummer, 40 Me. 172. It is true that many of the contracts of subscription dealt with in the preceding cases contained agreements, not only to take shares of stock in the corporation to be formed, but also to pay the company itself for the same, or something to that effect. We have not the slightest doubt, however, that the contract with which we are now dealing in the present case amounts substantially to the same thing. The cases above cited rest upon the principle that, where persons are authorized by law to obtain a charter for a specified legal purpose, they represent, in the initial steps, the yet unborn corporation, and whatever they lawfully do in the premises operates to the benefit of the corporation when it attains to complete legal existence, and it may then enforce contracts made in its behalf by its promoters.

CONTRACT IN RESTRAINT OF TRADE.—In Consumers Oil Co. v. Nunnemaker, 41 N. E. Rep. 1048, the Supreme Court of Indiana holds that a contract by which defendant, formerly a dealer in oil in the city of H, agreed to refrain from following such occupation for five years within the State of Indiana, the city of Indianapolis excepted, is unreasonable and void as a restriction of trade, and that such contract is not divisible, and being void as to the restriction within the State is void as to the restriction in the city of H. The court says in part:

We are not favored with a brief upon appellee's part, but infer from statements in the brief of the learned counsel for appellant that the contract in controversy was assailed by the appellee upon the ground that it sought to prohibit him from selling and delivering oil at any place in the State of Indiana, outside of the city of Indianapolis, and constituted an unreasonable restraint upon trade, and was, therefore, invalid, and not enforceable in any respect. Appellant contends that, notwithstanding the territory is the entire State of Indiana, with the exception mentioned, in which appellee is restricted from pursuing his business as an oil merchant, the restraint is a reasonable limitation, and that the complaint based upon the contract in question set forth a sufficient cause of action for the relief thereby sought. It is settled that a contract in general restraint of trade is invalid, but one restraining a party from trading within reasonable limits, so as not to be injurious to the interests of the public, is valid, and may be enforced by an injunction, upon a proper showing of facts. Beard v. Dennis,

6 Ind. 200; Duffy v. Shockey, 11 Ind. 70; Spicer v. Hoop, 51 Ind. 365; Baker v. Pottmeyer, 75 Ind 461; Beatty v. Coble (at this term), 41 N. E. Rep. 390. The settled rule, as enunciated by the American and English decisions of the highest courts, seems to be that where, in the particular case before the court, the restraint in controversy, as to territory, appears to be broader or larger than is necessary to the protection of the party seeking to enforce the restrictive contract, it is of no benefit to either party, but in that event becomes oppressive upon the party against whom the enforcement is sought, and, being oppressive, the law regards the restriction as unreasonable and injurious to the interests of the public. It is not the interests of the parties alone which in the eye of the law are to be considered the true test, but in each particular case, under the facts, the judicial inquiry is, will it be inimical to the public interest? If so, then, and in that event, the agreement must be held as hostile to public policy, and therefore void. Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good. This principle owes its existence to the very sources from which the common law is supplied. Greenh. Pub. Pol. pp. 2, 3. The law regards the good will of a particular trade or business as a species of property, possessing a market value, and subject to sale or disposal. But it is also a well-established principle of law and public policy that, where a person is engaged in trading or other legitimate pursuits, he shall not be unreasonably fettered in the exercise of such business, and, when he sells or disposes of the good will incident thereto, the law will only sustain such a restraint as to his future engagement in such business or pursuit as will appear to be a reasonable space of interdicted territory, and what are such reasonable limits is a question of law for the court to determine, under all the facts and circumstances in each particular case. In support of the several general propositions herein asserted, see Wiley v. Baumgarden, 97 Ind. 66, and authorities there cited; Lawrence v. Kidder, 10 Barb. 641; Hubbard v. Miller, 27 Mich. 15; Horner v. Graves, 7 Bing. 735; Navigation Co. v. Winsor, 20 Wall. 64; Taylor v. Blanchard, 13 Allen, 370; Dunlop v. Gregory, 10 N. Y. 241; Greenh. Pub. Pol. ch. 6, p. 683; 3 Am. & Eng. Enc. Law, 883, and authorities there cited; 22 Am. Law Rev. 873 889; Mallan v. May, 11 Mees. & W. 652. In the case of Dunlop v. Gregory, *supra*, the Court of Appeals of New York said: "Contracts, upon whatever consideration made, which go to the total restraint of trade anywhere in the State, are void. Such contracts are injurious to the public and operate oppressively upon one party, without being beneficial to the other. * * * The contract, to be upheld, must appear from special circumstances to be reasonable and useful, and the restraint of the covenanter must not be larger than is necessary for the protection of the covenantee in the enjoyment of his trade or business." In the case of Taylor v. Blanchard, *supra*, it was held that an agreement not to set up, exercise, or carry on the trade or business of manufacturing or selling shoe cutters at any place within the commonwealth of Massachusetts was void. In the case of More v. Bonnet, 40 Cal. 251, a stipulation not to engage in a business of a particular kind in the county or city of San Francisco or State of California was held to be void. In Lawrence v. Kidder, *supra*, a covenant not to conduct the business of manufacturing or trading in palm leaf beds or mattresses in the State of New York west of Albany was held to be invalid. In Price v. Green, 16 Mees. & W. 346, a contract not to carry on the perfume business within 600 miles of London was adjudged void. In Horner v. Graves, *supra*, an agreement not to practice dentistry within a district 200 miles in diameter was held to be void. In Beal v. Chase, 31 Mich. 490, where it appeared that the obligor sold a printing establishment, and the business thereof, which extended over the entire State, a covenant not to engage in the same business in that State so long as the vendee should continue in the business at the place of sale, under the circumstances, was held to be reasonable and valid. In Rousillon v. Rousillon, reported in 14 Ch. Div. 351, the English court of chancery held that there is no "hard and fast" rule holding contracts of this character, unlimited as to space, void, but that the validity depends upon the reasonableness of the contract; and, where it appears that the broad restriction is reasonably necessary for the full protection of the contractee, it will be sustained. In a recent English decision in the appeal of Nordenfelt v. Maxim Nordenfelt, etc., Co. (1894), App. Cas. 535, where a patentee and manufacturer of guns and ammunition for war purposes transferred his patent to a company, and covenanted with the latter not to engage in that business for a term of 25 years, it was held that, owing to the nature of the business, and the limited number of customers to whom sales might be made, confined mainly to governments of countries, the restraint imposed in that case was not larger than was necessary for the protection of the contractee, and not injurious to the public interest.

The decisions serve to illustrate the manner in which the courts, under varied circumstances, have been, and are, inclined to view such contracts. The rule in question, in its application by the courts in later decisions, to an extent, seems to have been modified, and is made to yield, in some respects, to the nature or character of the particular trade or business, and the territory over which it extends at the time of the sale of the good will. Cases do and will arise, as, for instance, in Beal v. Chase, *supra*, and Nordenfelt v. Maxim Nordenfelt, etc., Co., *supra*, where the particular business has been built up so as to extend over an entire district or State, and sometimes beyond, or where, from its nature, the number of those who patronize it are comparatively of a limited number, and where, consequently, broad or enlarged restrictions are considered as reasonably necessary for the desired protection, and are therefore sustained.

Viewed, then, in the light of the authorities cited herein, how stands the case at bar? It appears, and is conceded by appellant, that the particular business or trade in which appellee was engaged at the time he sold out and executed the contract in controversy was confined to the limits of the city of Hammond. There is no contention that it extended to any other parts of the State, beyond these limits. Neither from the nature of the business, nor otherwise, does it appear that it was necessary for the protection of appellant that the appellee should be prohibited from engaging therein at any and all places in the State, other than the city of Indianapolis. It is a matter of general knowledge that there are numerous consumers of oil for fuel and illuminating purposes in this great and growing State, and it is manifestly to their interest that there should be competition in the selling of the same, at least, that the price thereof may be reasonable. The enlarged covenant of restraint as to territory, it is obvious, was unnecessary under the circumstances. It could serve no purpose, except as a tendency towards a monopoly of the business. If appellant could buy out appellee, and restrict him in

this manner, it might proceed to do so to every other person in the whole State engaged in a similar business; and, eventually, reduce the sale of oils in the State to comparatively few hands, or, possibly, to its own absolute control, and thus virtually stifle legitimate competition. The law has always been hostile to the creation of monopolies, when they tend to impair the interest of the public. It is elementary that whatever is injurious to or against the public good is void on the ground of public policy. This policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance prices, to the injury of the public in general. Salt Co. v. Guthrie, 35 Ohio St. 666; People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. Rep. 798.

Appellant apparently insists that the contract may at least be held enforceable against appellee in the city of Hammond, and cites Peltz v. Eichele, 62 Mo. 171. In that case the agreement was not to enter into the manufacture of matches in the city of St. Louis, or any other place, for five years. The stipulation as to St. Louis was sustained, upon the ground that it was reasonable, and could be separated from the other clause. It is a recognized principle that when a contract is or can be so separated in parts as to constitute two agreements, one illegal and the other legal, the latter may be enforced, and the transaction *pro tanto* sustained. But it is otherwise where the contract in its nature is not divisible. Beard v. Dennis, *supra;* Wiley v. Baumgarden, *supra.* The contract before us is not of this character, and does not come within the provisions of the rule stated, and it must either stand or fall as an entirety. The restraint of the trade or business, as therein stipulated as to territory, under the circumstances, was manifestly too large, and is therefore in violation of the principles of public policy to which we have referred, and consequently void, and cannot, in any respect, be enforced. Judgment affirmed.

EMINENT DOMAIN — RIGHTS OF TENANTS.

1. Relation of Landlord and Tenant.
2. Condemnation of Part of the Premises under Right of Eminent Domain.
3. Condemnation of the Entire Premises.
4. Condemnation Money—Apportionment.
5. The Minority Doctrine.
6. Application of the Doctrine that the Tenant must Repair.
7. Destruction of the Subject-matter.
8. Future Rents—Landlord's Remedy.
9. Conclusion.

1. *Relation of Landlord and Tenant.*—In the feudal economy, rent had a two-fold quality: 1. Something issuing out of the land and tenements corporeal, as a compensation for the possession; 2. An acknowledgment by the tenant to the lord, of his fealty or tenure.[1] Under the modern conception rent is a return or compensation for the possession of some corporeal inheritance, and is a certain profit in money, provisions or labor issuing out of the land and tenements in return for their use.[2] Nothing but a surrender, a release, or an eviction, in whole or in part, can absolve the tenant from the obligation of his agreement to pay rent.[3] The owner of the leasehold and the owner of the reversion, together hold the fee-simple. Each has a distinct estate. The interest of the tenant, in law, is just as potential as that of the landlord, although in fact it may not practically be so valuable. Whatever be the method of ascertaining the values of these distinct interests, the sum of those values must be the full value of the property.

2. *Condemnation of Part of the Premises under Right of Eminent Domain.*—Taking a part of the property leased by the sovereign under the right of eminent domain is not an eviction. Hence, it is held partial appropriation has no effect on the covenant to pay rent.[4] So a condemnation of a part of the leased premises under this rule does not amount to an eviction; and whether the fee or mere easement be taken, the tenant still remains liable under his covenant to pay rent, originally reserved, because nothing short of a surrender, a release, or an eviction will discharge him. And if condemnation of part of the premises will not discharge the tenant's covenant to pay rent, neither will it operate to apportion the rent as to relieve the tenant of any portion of his liability to the lessor.[5] A partial condemnation is not an eviction or partial eviction, for an eviction is the act of the landlord or a third party holding under a paramount title.[6] Nor is it a release which is

[1] Pingrey on Real Prop. 115.

[2] Bouvier's L. Dict. tit. "Rent;" Spencer's Case, 5 Co. 16; 2 Bl. Com. 41; 3 Kent's Com. 460; Buszard v. Capel, 8 Barn. & Cress. 141.

[3] Gluck v. Baltimore (Md.), 27 Chi. L. News, 391; Fisher v. Milliken, 8 Pa. St. 111.

[4] Corrigan v. Chicago, 144 Ill. 537; Stubbins v. Evanston, 136 Ill. 37; Gluck v. Baltimore (Md.), 27 Chicago L. News, 391; Frost v. Earnest, 4 Whart. (Pa.) 90; Peck v. Jones, 70 Pa. St. 85; Ellis v. Welch, 6 Mass. 246; Parks v. Boston, 15 Pick. (Mass.) 198; Folts v. Huntley, 7 Wend. (N. Y.) 210; Foote v. Cincinnati, 11 Ohio St. 408; Emmes v. Feeley, 132 Mass. 346; Patterson v. Boston, 20 Pick. (Mass.) 159; Chicago v. Garrity, 7 Ill. App. 474; Workman v. Mifflin, 30 Pa. St. 362; Wagner v. White, 4 Har. & J. (Md.) 564; Schilling v. Holmes, 23 Cal. 230; Ross v. Dysart, 33 Pa. St. 452; Dyer v. Wightman, 66 Pa. St. 425; Dobbins v. Brown, 12 Pa. St. 75. Compare Biddle v. Hussman, 23 Mo. 597; Commissioners v. Johnson, 66 Miss. 248; Rolle's Abrid. 236.

[5] Gluck v. Baltimore (Md.), 27 Chicago L. News, 391.

[6] Taylor's Land. & Ten. 381.

the descending of the greater estate upon the less.[7] Nor is it a surrender, which is the yielding up of the less estate to him who has the reversion or remainder.[8] Taking part of the property under the rule for a public use leaves the tenant in the position of being deprived of part of his property, while he still is liable on his covenant to pay rent for the whole estate. So the condemnation proceedings cannot extinguish the rent. Hence, where a part of the leased premises has been appropriated for a street, the tenant is not released from payment of rent, but is entitled to recover from the city the damages he has sustained.[9] The lessee takes his term just as any other owner takes his title, subject to the right and power of the State to take it or part of it for public use, whenever the public use and necessity may require. Such a right is not an incumbrance, and such taking is no breach of the covenant of the lessor for quiet enjoyment.[10] Such a taking operates upon the lessee's interest as an injury for which the State is to make compensation, but does not affect his liability to pay rent for the entire estate according to the tenor of his lease, as the courts generally hold.

3. *Condemnation of the Entire Premises.*—While condemnation proceedings may not amount to a technical eviction, yet where the entire tract of land is taken, its effect is to abrogate the relation of landlord and tenant, for whatever title the tenant, as well as the landlord, has in the land passes to the State or corporation in whose behalf the right of eminent domain is exercised. The effect is an absolute extinguishment of the right and title of both in or control over the subject of demise. It is in effect eviction by paramount title, coupled with a conveyance by the owners of their respective interest, and, therefore, the liability of the tenant to pay rent ceases.[11] And in any action brought by the landlord for the rent accrued after the termination of the estate by condemnation, the tenant may plead such extinguishment in defense.[12]

4. *Condemnation Money—Apportionment.*—So where the premises are all taken, the compensation must be apportioned between the landlord and tenant. The lessor's interest is the reversion with the rents added. The tenant's interest in the estate is the value of the term, subject to the rents, and each must receive compensation. The money stands in lieu of the land taken, to be apportioned upon the several interests in the premises. If the value of the leasehold estate exceeds the rental, the tenant will be entitled to the excess. If it does not exceed the rent, he will receive no compensation. The appropriation of part of the estate for a public use leaves the tenant in the position of being deprived of a part of his property, while he still remains liable to pay rent for the whole of it, and to that extent obviously does him an appreciable injury, which should be considered by the jury in estimating the decreased market value of the remaining portion of the demised premises. As the tenant's estate is entirely distinct from the lessor's and both estates being of value and vested, they must be protected by the constitutional provision that property cannot be taken without due process of law; hence, each must be awarded in money an amount equivalent to the value of that which is taken from him; in estimating the decreased value of the estate remaining to the tenant, compensation must be awarded him for the rent to be paid on that part taken and the value of the term for the portion condemned, provided the value exceeds the rental. The jury should be allowed to consider all the circumstances affecting the market value of that part of the leasehold estate remaining after a part has been taken. The lessee cannot maintain an action against the lessor to recover from him a certain portion of the compensation allowed the latter, on the ground that it was intended for the purpose of putting the property in a tenantable condition, provided it be a house injured by the condemnation proceedings, nor on the ground that his leasehold is greatly damaged. The lessee must see to it that his injury is

[7] Taylor's Land. & Ten. 507.

[8] Co. Litt. 337 b.

[9] Foote v. Cincinnati, 11 Ohio St. 408.

[10] Parks v. Boston, 15 Pick. (Mass.) 198; Folts v. Huntley, 7 Wend. (N. Y.) 211.

[11] Parks v. Boston, 15 Pick. (Mass.) 198; Folts v. Huntley, 7 Wend. (N. Y.) 211; Foote v. Cincinnati, 11 Ohio St. 408; Stubbins v. Evanston, 136 Ill. 37, 11 L. R. A. 839 and note; Corrigan v. Chicago, 144 Ill. 537, 21 L. R. A. 212, and note. See, also, Montayne v. Wallahan, 84 Ill. 355; Emmes v. Feeley, 132 Mass. 346; O'Brien v. Ball, 119 Mass. 28; Harrison v. Myer, 92 U. S. 111; Barclay v. Pickels, 38 Mo. 143.

[12] Parks v. Boston, 15 Pick. (Mass.) 198; Folts v. Huntley, 7 Wend. (N. Y.) 211; Foote v. Cincinnati, 11 Ohio St. 408; Stubbins v. Evanston, 136 Ill. 37.

provided for when damages are awarded the lessor.[13] If the covenant to pay rent is not affected by the condemnation, the lessor will be entitled as compensation, only to the present value of his reversion which he holds subject to the term created by his lease; and the tenant continues personally liable; but losing his estate and right to enjoy it, he will be entitled to receive not merely the value of the term, but also a sum of money equivalent to the present value of the sum of the rents *in futuro;* or he should receive the value of his term subject to the rents, and such further sum as will be considered a present equivalent for the rent thereafter to be paid,[14] because the landlord's title is absolutely extinguished in the leased estate, and he cannot, therefore, enforce the contract for the payment of rent after the extinguishment of his estate.[15] This doctrine is the overwhelming weight of authority. The taking of a part of the premises does not operate as an apportionment of the rent, because the condemnation and appropriation of land is not the act of the lessor, and is not an eviction by him, so the rent cannot be apportioned.

5. *The Minority Doctrine.*—A contrary doctrine has been accepted by some courts, and it is held that the exercise of the sovereign power of eminent domain, by which a portion of the demised premises is taken, operates as an apportionment of rent, and dissolves the relation of landlord and tenant *pro tanto;* this undoubtedly is the better rule.[16] Because the condemnation of part of the premises discharges it from a proportionate part of the rent, and extinguishes that rent accordingly. And the apportionment must be made by a jury who will determine whether anything, and how much, is due, and have reference in making their estimate, to the real value of what is left to the tenant, and not to the quantity.[17] When the lessor ceases to have any interest in the property, the rent becomes annihilated. And hence, a total or partial appropriation abates the rent either wholly, or in part, as the case may be.[18] Mr. Lewis says, "undoubtedly the conclusion which is practically the most satisfactory, and which can be applied with the least injury to the parties is that the taking operates to extinguish the obligation to pay rent, in whole or in part, as the case may be."[19] But this doctrine it is argued is not consonant with other law existing between landlord and tenant and, therefore, is objectionable on this point alone, if no other objection existed, and has not been adopted by the courts in general. Because the act of the State does not constitute an eviction by the landlord, and therefore, the tenant necessarily continues liable for the rent, and has full recourse against the State for all damages he sustains.

6. *Application of the Doctrine That the Tenant must Repair.* —The rule is that the landlord is not liable to the tenant for not repairing the premises unless he covenants so to do.[20] And a covenant is never implied that the lessor will make them.[21] So the destruction of buildings and improvements upon the land demised does not relieve the tenant from the obligation to pay rent.[22] The tenant is bound to continue to pay rent during the term, even though the buildings have burned down, unless he protects himself by an express covenant against liability in this matter.[23] The same rule applies it is held where a leased building is injured by condemnation proceedings. The lessor is under no covenant to make repairs, and the lessee must repair the building. And whether he repairs or not he must pay the lessor full rent during the remainder of the term; the rent is not abated *pro tanto.* The rent is-

[13] Turner v. Williams, 10 Wend. (N. Y.) 140; Brooks v. Boston, 19 Pick. (Mass.) 174; Gluck v. Baltimore (Md.), 27 Chicago L. News, 391.

[14] Corrigan v. Chicago, 144 Ill. 537, 21 L. R. A. 212 and note. So if the whole land be taken for public use, which has been leased, the rent thereafter ceases, Corrigan v. Chicago, 144 Ill. 537; Barclay v. Pickels, 38 Mo. 143; Cuthbert v. Kuhn, 3 Whar. (Pa.) 357.

[15] Lampson v. Clarkson, 113 Mass. 348; Corrigan v. Chicago, 144 Ill. 537. See, also, Montayne v. Wallahan, 84 Ill. 355; Harrison v. Myer, 92 U. S. 111; O'Brien v. Ball, 119 Mass. 28; Emmes v. Feeley, 132 Mass. 346.

[16] Commissioners v. Johnson, 66 Miss. 248. See, also, Rolle's Ab. 236.

[17] Biddle v. Hussman, 23 Mo. 597.

[18] Barclay v. Pickels, 38 Mo. 143. See, also, Lewis' Eminent Domain, 483.

[19] Lewis' Eminent Domain, 483. See 29 Am. L. Review, 451, leading and valuable article by Joseph H. Taulane.

[20] Burns v. Fuchs, 28 Mo. App. 279; Cantrell v. Fowler, 32 S. Car. 589; Weinstein v. Harrison, 66 Tex. 546; O'Connor v. Gourand, 14 Daly (N. Y.), 64; Mullen v. Rainear, 45 N. J. L. 520.

[21] Sheets v. Selden, 7 Wall. (U. S.) 423; Kramer v. Cook, 7 Gray (Mass.), 550; Mayer v. Mitchell, 53 Md. 175.

[22] Taylor v. Caldwell, 3 Best & Smith, 826; Leeds v. Cheetham, 1 Sim. 146; Lott v. Dennes, 1 El. & El. 474.

[23] Moffatt v. Smith, 4 N. Y. 126; Fowler v. Bott, 6 Mass. 63; Bussman v. Gauster, 72 Pa. St. 285.

sues out of the real estate whether it be land or buildings incorporated in the land. By the destruction of part of the realty, either by fire or by condemnation proceedings, the tenant's liability to pay full rent is not modified in the least.

7. *Destruction of the Subject-Matter.*—If the subject-matter is destroyed by fire or otherwise, it terminates the relation of landlord and tenant, thus, where the tenant leases only the building, its destruction by fire terminates his liability to pay rent.[24] So when a tenant has leased the upper story of a building or rooms therein, and the building is destroyed by fire or by other agencies, his obligation to pay rent ceases, because he cannot enjoy the premises in any manner thereafter nor can he rebuild. As he cannot occupy the space of the demised story or rooms, the landlord has no more claim upon him.[25] The same rule applies as to condemnation, when the entire premises are taken. The tenant cannot occupy the premises or any portion of them, and his obligation to pay rent ceases. And as a lease is now only a contract for the possession and use of real estate, when the tenant is deprived of the demised premises by sovereignty, and the lessor has received full compensation for his estate, there is no reason why the tenant should not be relieved from all obligations to pay further rent. And whatever damages the tenant has received will entitle him to a just compensation.[26] Upon the plainest principles of justice, whatever expense the tenant has been obliged to pay, or whatever loss the condemnation has caused him, as estimated by a jury, entitle him to compensation. And if the entire estate is not taken, but the remainder is of no value to the tenant, it is equivalent to condemning the whole and will so be considered by a jury and the tenant will be absolved from paying further rent; and the condemnation money must be for the entire estate, and an apportionment made according to the relative rights of the parties.

8. *Future Rents—Landlord's Remedy.*—If the landlord's remedy to collect his rents will be impaired or defeated on account of the insolvency of the tenant, or otherwise, a court of equity may interfere to prevent the payment of the damages recovered in a proceeding for condemnation under eminent domain, into the hands of the tenant, and appropriate so much of the fund as may be necessary to the payment of the rents due or to become due to the landlord.[27] Or as the future rents belong to the landlord, it is proper in a court administering equity, with all the parties before it, to award the future rents to the landlord to whom they would ultimately go.[28] Where the whole estate is taken, the proper proceeding is to award the landlord and the tenant the present value of the interest coming to each. And where a partial taking occurs, it will be better to award the landlord the present value of the future rents of that portion condemned, thus eliminating from the contract that portion condemned, it having, in fact, ceased to exist as between the parties.

9. *Conclusion.* — Under the present conception a lease is only a contract for the possession and use of real property. Under this doctrine a partial appropriation of the land should abate the rent *pro tanto*. The portion taken ceases to exist as to the landlord and tenant; their titles have been divested by sovereignty for value received. A portion of the subject-matter of the lease has been extinguished; the estates to this part formerly held by the tenant and the landlord have been transferred, and why should the tenant pay rent on real property, to the landlord who has no title to it. The exercise of the sovereign power of eminent domain, by which a portion of the real estate demised is taken, operates in fact as a destruction of part of the subject-matter between the parties, and dissolves the relation of landlord and tenant *pro tanto*.[29] The conclusion forces itself that taking leased property under eminent domain, operates to extinguish the obligation to pay pent, in whole or in part, as the case may be; this is the logical construction, though the majority of the courts refuse to accept it. Whenever a part of the estate is annihilated by sovereignty, the relation of landlord and tenant should cease as to that part.

D. H. PINGREY.

Bloomington, Ill.

[24] Taylor's Land. & Ten. 520.
[25] Graves v. Berdan, 26 N. Y. 498.
[26] Stubbins v. Evanston, 136 Ill. 37; Corrigan v. Chicago, 144 Ill. 537.
[27] Stubbins v. Evanston, 136 Ill. 37.
[28] Dyer v. Wightman, 66 Pa. St. 425.
[29] Commissioners v. Johnson, 66 Miss. 248; Biddle v. Hussman, 23 Mo. 597.

PAROL EVIDENCE — ADMISSIBILITY TO EXPLAIN A RESERVATION IN A DEED.

BEVER V. BEVER.

Supreme Court of Indiana, November 8, 1895.

Parol evidence is admissible to show that the reservation in a deed of a life estate to the grantors was made to secure payment of the unpaid purchase price payable in support, and by allowing the grantors to reside on the premises.

MONKS, J.: This action was brought by appellant against appellee. The complaint is in two paragraphs, the first of which was to recover possession of real estate, with damage for its detention, and the second to quiet title thereto in appellant during her life. Appellee filed a general denial, and the cause was tried by a jury, and a special verdict returned, upon which, over a motion by appellant for a judgment in her favor, and over a motion for a new trial, judgment was rendered in favor of appellee, to which appellant excepted.

The special verdict, so far as necessary to determine the questions presented on this appeal, was as follows: "On the 6th day of August, 1890, Henry Bever, Sr., was the sole owner in fee-simple of the real estate in controversy. Appellant was his wife and appellee his son. Henry Bever, Sr., was old and feeble, about 78 years old, and was desirous of making a division and distribution of his estate. He had six children, including appellee. He had made no advancement to appellee or his daughter Mary, but had advanced to each of his other children large sums of money. Said Bever, Sr., was indebted to appellee in the sum of $2,400 for work and labor. On August 6, 1894, Henry Bever, Sr., sold said real estate to appellee for $11,200; that, as a payment on the purchase money, $2,200 as an advancement and $2,400 for said indebtedness was allowed. Bever, Sr., to equalize all his children with the $2,200 advanced in said land to appellee, executed his notes secured by mortgage on said real estate, payable to his said children, amounting in all to $3,439.50, which appellee assumed and agreed to pay as a part of the purchase money for said real estate, and also agreed to pay $1,200 cash to said Mary Bever, thereby making her advancement, with the note executed to her, $2,200. It was further agreed, as a part of said purchase price of said real estate, that appellee should support said Henry Bever, Sr., and his wife, the appellant, so long as either of them should live, and it was further agreed, as a part of said sale and purchase, that said Bever, Sr., and his wife should occupy and have the use of the residence on said premises. On August 6th said Henry Bever, Sr., and his wife executed to appellee a warranty deed conveying said real estate to him in fee-simple, except that after the granting clause in said deed, and after a description of the premises, there was inserted the following, to wit: 'The grantors herein except and expressly reserve from this grant a life estate into and upon all said real estate in favor of said Henry Bever and Mary Bever, and the said Henry Bever and Mary Bever hold, retain, and reserve a life estate during their natural lives in their favor upon all said real estate and out of the same.' The provisions contained in said deed excepting and reserving a life estate was inserted, and such life estate was reserved by said grantors solely for the purpose, and with the understanding and agreement, that the same was to secure the grantors in the possession of said residence, and to secure the performance by appellee of his agreement to support the said grantors; and it was further agreed at the said time, by and between said grantors and said grantee, that the whole estate in fee-simple, including said life estate, should pass and be transferred to said grantee, except that the legal title to the real estate mentioned in said deed should remain in said grantors as security, as aforesaid; and it was further agreed by and between said grantors and grantee that the possession of said premises, except the residence, should be turned over and surrendered to said appellee, the grantee, and should continue in his possession unless he should fail to perform said agreement, and that he should have the use, proceeds, rents, and profits of said real estate during the life-time of said grantors, so long as he should perform his contract, without the payment of any rent. On the 6th of August the grantors placed appellee in full possession of said real estate, except said residence, and appellee immediately took possession, and has ever since said time remained in, and now is in, exclusive possession of said premises, and is using the same for farming purposes. In the fall of 1890 appellee placed upon said premises a house of the cost and value of one thousand dollars, and made other lasting and valuable improvements, all with the consent and knowledge of the grantors, and at his own expense. Appellee has from the date of said deed paid all the taxes on said real estate, including the taxes due in the spring of 1894. The grantors have never paid, or offered to pay, the same to him. Henry Bever, Sr., died May 18, 1893. From the date of said deed appellee furnished reasonable support to grantors, and gave them all the support that they or either of them required of him, and, ever since the death of his father, appellee has furnished appellant reasonable support, and has furnished to her all the support she required or requested. Since November, 1893, and ever since the commencement of this action, appellee has furnished to the appellant, and she has received from him, her support, including groceries, provisions, money, and clothing, firewood, and such other articles as she needed, and ever since the death of her husband, and up to the time of this trial, the plaintiff has called upon the appellee for her support, and the same has been furnished by appellee to appellant, and has been received by her, under and in pursuance of said agreement by appellee to support said grantors during their lives. Ap-

pellee has at all times been ready and willing to perform his said contract, so made with Henry Bever, Sr., and has kept and performed the same. The house which was on said real estate at the date of said deed has ever since been occupied by the grantors. In November, 1893, appellant, by one Pursely, her son-in-law and agent, ordered appellee to quit the possession of said premises, which he refused to do, upon the ground that he was the owner thereof. Afterwards appellant consented that appellee remain in possession of said real estate, and directed him to put in a crop, which he did."

Appellant insists that the court erred in rendering judgment on the special verdict in favor of appellee; "that the deed reserved her a life estate, and the parol agreement set out in the special verdict, and made before or contemporaneous with the execution of the deed, cannot enlarge, diminish, or vary the terms of the deed, or render inoperative and defeat the terms of this life estate; that such findings, contradicting the terms of the reservation in the deed, should have been disregarded, and judgment rendered for appellant."

It is the general rule that, in the absence of fraud or mistake, parol agreements made before or contemporaneously with a written contract cannot be given in evidence to contradict, vary, or modify the writing. Coy v. Stucker, 31 Ind. 161; Hosteter v. Auman, 119 Ind. 71, 20 N. E. Rep. 506. In Philbrook v. Enswiler, 92 Ind. 590, this court approved the rule in this language: "Nothing is better settled than that, where two parties have entered into a written contract, all provisions, negotiations and propositions in relation to such contract, whether parol or written, are to be regarded as merged in the final agreement. King v. Insurance Co., 45 Ind. 43." It has also been held by this court that by the execution of a deed the preliminary contract is executed, and any inconsistencies between its original terms and those in the deed are to be explained and settled by the deed alone. Philbrook v. Enswiler, *supra;* Cole v. Gray, 139 Ind. 396, 38 N. E. Rep. 856. A deed, however, as a general rule, does not state the entire contract, and such is not the purpose of its execution. It is the evidence of the consummation of a part of some contract previously made. It is not the purpose of a deed to state how, when, or in what manner the consideration shall be paid. Davis v. Hopkins (Colo. Sup.), 32 Pac. Rep. 70; Trayer v. Reeder, 45 Iowa, 273. It is also settled law that the real consideration of a deed may be shown by parol evidence, although it be different from the consideration stated in the deed. Hays v. Peck, 107 Ind. 389, 8 N. E. Rep. 274. Under a deed of general warranty, it may be proven by parol evidence that the grantee assumed and agreed to pay any lien or incumbrance as a part of the consideration, when the same is not mentioned in the deed. Carver v. Louthain, 38 Ind. 530; McDill v. Gunn, 43 Ind. 315. It is equally well settled that a deed absolute on its face may be shown by parol evidence to have been executed only as a mortgage. Ashton v. Shepherd, 120 Ind. 69, 22 N. E. Rep. 98; Tuttle v. Churchman, 74 Ind. 311; Crane v. Buchanan, 29 Ind. 570; Chase's Case, 17 Am. Dec. 300; Hutzler v. Phillips (S. C.), 4 Am. St. Rep., note on page 707 (1 S. E. Rep. 502); Stew. Mortg. § 38. This court said in Hanilon v. Doherty, 109 Ind. 37, 9 N. E. Rep. 782: "It is a familiar rule of equity that a deed, although absolute on its face, is nothing more than a mortgage when executed to secure an existing debt. No matter what form a transaction may assume, if it appears that the instrument was executed to secure a subsisting debt, it will be adjudged to be a mortgage." See 4 Am. St. Rep., note, pp. 697-708 (1 S. E. Rep. 502). The grantor may in the deed, by express reservation, create an equitable mortgage to secure the unpaid purchase money whether payable in money or otherwise. The reservation of such lien is equivalent to a mortgage taken contemporaneously with the deed, and gives the purchaser the right of redemption. Lucas v. Hendrix, 92 Ind. 54, and cases cited; Harvey v. Kelly, 41 Miss. 490; Davis v. Hamilton, 50 Miss. 213; Moore v. Lackey, 53 Miss. 85; Deason v. Taylor, *Id.* 700; Heist v. Baker, 49 Pa. St. 9; Markoe v. Andras, 67 Ill. 34; Carpenter v. Mitchel, 54 Ill. 126; Dingley v. Bank, 57 Cal. 467; 4 Am. St. Rep., note on page 706 (1 S. E. Rep. 502); 6 Am. & Eng. Enc. Law, 682, note 4; 28 Am. & Eng. Enc. Law, 184-189, and notes; 1 Ping. Chat. Mortg. § 320; 1 Jones, Mortg. §§ 228, 229; Stew. Mortg. § 37, notes 10-12. This court held in Lucas v. Hendrix, *supra*, that a warranty deed in the statutory form, containing a provision that upon the payment of a sum of money to the grantor the grantee shall be seised in the fee-simple, and that payment may be compelled by suit creates an equitable mortgage in favor of the grantor. In Carr v. Holbrook, 1 Mo. 240, it was held that a deed made for land, to be absolute on the payment of certain notes, but in default of payment to be void, was to be considered a mortgage. Pugh v. Holt, 27 Miss. 461, is to the same effect.

It is clear from these authorities that the grantor in the deed in controversy might have inserted a provision in the deed that a lien was reserved on the real estate to secure the payment of the unpaid purchase money, whether payable in money or support and maintenance of the grantors, and the same would have been an equitable mortgage on the entire estate. Upon the same principle, if it had been written, after the reservation of the life estate in the deed executed in this case, that said life estate was reserved to secure the payment of the unpaid purchase money, however payable, the same would have been an equitable mortgage on such life estate, the same, in effect, as if the whole estate had been conveyed to appellee, and he had executed a mortgage conveying said life estate to the grantors, to secure the said unpaid purchase money. 4 Am. St. Rep.

706, note (1 S. E. Rep. 502), and authorities, *supra*.

This brings us to the final question, may it be shown by parol evidence that the reservation of the life estate was made to secure payment of the unpaid puchase money, payable in support, and allowing grantors to reside on the premises? If a deed absolute in form may be shown by parol evidence to have been executed as a mortgage, it as conclusively follows that a reservation in a deed may be shown by parol evidence to have been executed as a mortgage. The conclusion we have reached disposes of the question presented in regard to the parol evidence admitted over appellant's objections. Considering the reservation as an equitable mortgage, the right of possession under the deed is in appellee. Parker v. Hubbel, 75 Ind. 580; Chitwood v. Trimble, 2 Baxt. 78. The parties have so construed the deed. Possession was given by the grantors and taken by appellee when the deed was executed, and has been held until the commencement of this action by appellee, who has made improvements and paid taxes and kept the premises in repair with the full knowledge of the grantors, and without objection from them. Johnson v. Gibson, 78 Ind. 284, and cases cited; Lyles v. Lescher, 108 Ind. 382, 9 N. E. Rep. 365; Dwenger v. Geary, 113 Ind. 122, 14 N. E. Rep. 903.

It follows that the court did not err in rendering judgment on the verdict in favor of appellee. The case of Ikerd v. Beavers, 106 Ind. 483, 7 N. E. Rep. 326, cited by appellant, is not in point here, as neither party to this case is seeking to enforce specific performance of any contract or to set aside a contract. There is no available error in the record. Judgment affirmed.

NOTE.—*Parol Evidence to Vary Deed.*—The general rule that parol evidence is inadmissible to contradict, alter, add to or vary a written instrument applies to a deed as an entirety and to its several parts. Jackson v. Sternberg, 20 Johns. (N. Y.) 49; Tobin v. Gregg, 34 Pa. St. 446; Kelley v. Saltmarsh, 146 Mass. 585; Lowdermilk v. Bostick, 98 N. C. 299; Logan v. Bond, 13 Ga. 192; Sage v. Jones, 47 Ind. 122; Lincoln v. Parsons, 1 Allen (Mass.), 388; Spurrier v. Parker, 16 B. Mon. (Ky.) 274; Hall v. Eaton, 139 Mass. 217. Evidence is not admissible to show that the land conveyed did not contain the quantity of acres expressed in the deed. Howes v. Barker, 3 Johns. (N. Y.) 506, or to contradict the certificate of acknowledgment in a deed (Greene v. Godfrey, 44 Me. 25), or to vary or contradict a plan referred to in a deed and made a part of it. Renwick v. Renwick, 9 Rich. L. (S. Car.) 50. Parol evidence is inadmissible to insert a reservation or limitation (Lear v. Durgin, 64 N. H. 618; Rathburn v. Rathburn, 6 Barb. (N. Y.) 98; Noble v. Bosworth, 19 Pick. 314), or to insert a condition (Miller v. Fletcher, 27 Gratt. (Va.) 403; Warren v. Miller, 38 Me. 108), or to enlarge or diminish the extent of the grant (Holcomb v. Mooney, 13 Oreg. 503), unless where monuments of boundary were erected at the execution of the deed. Reed v. Shenck, 2 Dev. L. (N. Car.) 415; Massengill v. Boyles, 4 Humph. (Tenn.) 205. The description of land in a deed which seems certain and without ambiguity, for anything appearing on the face of the deed, is not rendered uncertain by extrinsic facts and parol evidence is not admissible to contradict such description. Claremont v. Carleton, 2 N. H. 369. A deed purported to convey lot nine, block twenty-eight. There was no such lot in existence. It was held that parol evidence was inadmissible to show that lot twenty-eight, block nine, was meant. Ritchie v. Pease, 114 Ill. 353. Evidence that a grantor about the time of executing a deed of land bounded on a way built a wall and established bounds at the edge of the way, is inadmissible to prove that the way did not pass by the deed. Fisher v. Smith, 9 Gray (Mass.), 441. A grant of a right of way across land does not authorize the grantee to enter at one place, go partly across, and come out at another place on the same side of the lot; and parol evidence to show that such was the intention of the grant is inadmissible. Comstock v. Van Densen, 5 Pick. 163; Jordan v. Ohio, 38 Me. 429; Farrar v. Hinch, 20 Ill. 646. It has been held in Pennsylvania (Backenstoss v. Stahler, 33 Pa. St. 251; Harbald v. Kuster, 44 Pa. St. 392); North Carolina (Flint v. Conrad, 93 Amer. Dec. 588), and Vermont (Merrill v. Blodgett, 34 Vt. 480), that it may be shown by parol that the growing crops were reserved though there is no exception in the deed. But this seems to be contrary to the weight of authority. Gibbins v. Dillingham, 10 Ark. 9; Smith v. Price, 39 Ill. 28; McIlvaine v. Harris, 20 Mo. 457; Winterwort v. Light, 46 Barb. (N. Y.) 278.

In Indiana it is held that evidence of a parol reservation of the crop at the time of the sale of the land is admissible. Harvey v. Million, 67 Ind. 90, overruling Chapman v. Long, 10 Ind. 465. Parol evidence is inadmissible to control their covenants. Johnson v. Walker, 60 Iowa, 315. See, also, Brooks v. Maltbie, 2 Stew. & P. (Ala.) 96; Phillips v. Costley, 40 Ala. 486; Young America Engine Co. No. 6 v. Sacramento, 47 Cal. 594; Aguirre v. Alexander, 58 Cal. 21; Hanby v. Tucker, 23 Ga. 132, 68 Am. Dec. 514; Sawyer v. Vories, 44 Ga. 662; Smith v. Odom, 63 Ga. 499; Emor v. Thompson, 46 Ill. 214; Winn v. Murehead, 52 Iowa, 64; Pride v. Lunt, 19 Me. 115; Whitmore v. Learned, 70 Me. 276; Morrill v. Robinson, 71 Me. 24; Goodrich v. Longley, 4 Gray (Mass.), 379; Warren v. Cogswell, 10 Gray (Mass.), 76; Stowell v. Buswell, 135 Mass. 340; Beers v. Beers, 22 Mich. 42; Caldwell v. Layton, 44 Mo. 220; King v. Fink, 51 Mo. 209; Dean v. Erskine, 18 N. H. 81; Proctor v. Gilson, 49 N. H. 62; Todd v. Philhower, 24 N. J. L. 796; Jackson v. Roberts, 11 Wend. (N. Y.) 422; Kenny v. Aitken, 9 Daly (N. Y.), 500; Jackson v. Hart, 12 Johns. (N. Y.) 77, 7 Am. Dec. 180; Jackson v. Foster, 12 Johns. (N. Y.) 488; Greenvault v. Davis, 4 Hill (N. Y.), 643; Taylor v. Baldwin, 10 Barb. (N. Y.) 582; Herring v. Wiggs, Term (N. Car.), 24; Wade v. Pelliter, 71 N. Car. 74; Bonham v. Craig, 80 N. Car. 224; Johnston v. Haines, 2 Ohio, 55; Duff v. Wynkoop, 74 Pa. St. 300; Ryan v. Goodwin, 1 McMull. Eq. (S. Car.) 451; Norwood v. Byrd, 1 Rich. (S. Car.) 135, 42 Am. Dec. 406; Pratt v. Phillips, 1 Sneed (Tenn.), 543, 60 Am. Dec. 162; Bigham v. Bigham, 57 Tex. 238; Butler v. Gale, 27 Vt. 739.

Late Cases on the Subject.—Where an agreement for the sale of land states the dimensions, but the land cannot be identified unless by reference to a plat of a much larger tract, which plat appears in the agreement, oral evidence is admissible to ascertain the relation of the parties to any land shown on the plat which would satisfy the terms of the agreement. Baker v. Hall (Mass.), 33 N. E. Rep. 612. Parol evidence is admissible to establish identity and possession under a defective or ambiguous description of land, in an act of sale, only where there is enough in the description to leave the title resting substantially

on writing, and not on parol. Kernan v. Baham (La.), 13 South. Rep. 155. Parol evidence is admissible to apply a written description in a contract of sale to certain land, though not to describe the land intended to be sold. Peart v. Brice (Pa. Sup.), 25 Atl. Rep. 537, 152 Pa. St. 277, 31 W. N. C. 336. Lands described in a contract of exchange may be identified by parol evidence, where the memorandum is sufficient to show the subject-matter. Ham v. Johnson (Minn.), 52 N. W. Rep. 1080. Where an agreement for the sale of land states the dimensions, but the land cannot be identified unless by reference to a plat of a much larger tract, and the land shown on the plat was once owned by one E, the words, "now or formerly of" E, which are marked on a single parcel, do not raise an ambiguity, as they indicate that the parcel is a monument for the identification of other land which is under description. Baker v. Hall (Mass.), 33 N. E. Rep. 612. Where there is no ambiguity in the description contained in a deed, and none is shown when the description is applied to the land, parol evidence is inadmissible in an action of ejectment between two grantees to show the intention of the common grantor and plaintiff at the time of the execution of the deed. Muidoon v. Deline, 31 N. E. Rep. 1091, 135 N. Y. 150. Where a deed purports to convey land on which a log chute is situated, and doubt arises as to which of two log chutes is meant, evidence of the location and use of both chutes is admissible. Thacker v. Howell (Ky.), 26 S. W. Rep. 719. In an action to recover for breach of contract to buy land, it was described in the petition as "Lots 28 and 31." A letter of defendant was introduced to show the contract relied on by plaintiff, stating that defendant would pay plaintiff specified amounts for "top block No. 1" and "top block No. 2." Held, that the letter was admissible, though the land described therein did not appear therefrom, or by reference to any other writing, to be the same as that described in the petition, it being competent to show such fact by parol evidence. Tinsley v. Dowell (Tex. Civ. App.), 24 S. W. Rep. 928. A deed of land known as the "W. Homestead;" 200 acres, more or less; bounded by the lands of certain persons named, "and of others,"—may be explained by the grantor so as to identify the land, and show the names of the "others," adjoining owners. Rapley v. Klugh (S. C.), 18 S. E. Rep. 680. Parol testimony by the grantor to contradict his deed and to vary the description of the lands thereby conveyed by him is inadmissible. Harding v. Wright (Mo. Sup.), 24 S. W. Rep. 211. Where plaintiff accepted a quitclaim deed of land, title to which has failed, he cannot, in an action to recover the price, show a parol agreement that he was to have a warranty deed. Cartier v. Douville, 56 N. W. Rep. 1045, 98 Mich. 22. When a deed to land conveys "all right" the grantor had to water from a spring on the granted premises, parol evidence is admissible to show that the only interest claimed by the grantor was that of a licensee. Coffrin v. Cole (Vt.), 31 Atl. Rep. 313. Where a deed purports to convey all the interest which the grantor had and claimed in and to a part of certain land, evidence is admissible to show what part he claimed. Curdy v. Stafford (Tex. Civ. App.), 27 S. W. Rep. 823; reversed in (Tex. Sup.), 30 S. W. Rep. 551. Parol evidence is admissible to identify land described in a partion decree as that "known as the property of R. deceased." Calloway v. Henderson (Mo. Sup.), 32 S. W. Rep. 34. Where a deed designated certain monuments as the corners of the tract conveyed, in addition to giving the length of each side, the former description will prevail; and in trespass, parol evidence is admissible to point out such monuments. Stinchfield v. Gillis (Cal.), 40 Pac. Rep. 98. Where the description in a deed is free from ambiguity, parol evidence is not admissible to show that the premises in controversy were intended to be included therein. Elofrson v. Lindsay (Wis.), 63 N. W. Rep. 89. Extrinsic evidence is not admissible to show acquiescence in a different location than that described in a deed, where the description is definite and unambiguous. Elofrson v. Lindsay (Wis.), 63 N. W. Rep. 89. A lease which specifies that it is to embrace as many as 50 lots of land within certain described boundaries may be applied by parol evidence to particular lots within those boundaries, notwithstanding the boundaries may comprehend more than 50 lots. Gress Lumber Co. v. Coody, 21 S. E. Rep. 217, 94 Ga. 519. A description of lands in a deed as "lying on the west side of S street, and north of M street, followed by courses and distances from a stone" on S street, around a parallelogram to the place of beginning, without indicating whether the starting point is at the intersection of S and M streets or at a more remote point, is not so vague and uncertain on its face as to require the exclusion of proof *alieunde* to locate the land by fitting the description to the lot claimed in the deed. Hartsell v. Coleman (N. C.), 21 S. E. Rep. 392. Where the description in a deed was "a certain tract of land in this State, lying about 12 miles above F, containing about 500 acres," parol evidence was admissible, in trespass to try title, in support of the description of the land intended to be conveyed. Cox v. Rust (Tex. Civ. App.), 29 S. W. Rep. 807. In an action by a holder of a tax deed to recover a lot conveyed by it, it appeared that in the city plat the lot was described as "lot 5, block 144, C's addition to the city of D," and that it was described in the tax list and in plaintiff's deed as "lot 5, block 144, East D, A County, Col." Held that parol evidence was admissible to show that the two descriptions applied to the same property and that the property was as well known by one description as by the other. Sullivan v. Collins (Colo. Sup.), 39 Pac. Rep. 334.

BOOK REVIEWS.

COOLEY'S ELEMENTS OF TORTS.

In our last issue we gave an extended review of the above work, which was erroneously entitled "Cooley on Torts," while the volume reviewed is Cooley's Elements of Torts. As this book is not and does not purport to be a new edition of Judge Cooley's larger work on torts, the heading of the review was misleading. We make this statement in order to correct any erroneous impression, which may have arisen. Cooley's Elements of Torts is published by Callaghan & Company, Chicago.

BALLARD'S ANNUAL OF THE LAW OF REAL PROPERTY.

This is volume three of a very useful series of books, to which we have heretofore called attention. It is a complete compendium of real estate law, embracing all current case law on that subject carefully selected, thoroughly annotated and epitomized. It is a well printed volume of nearly one thousand pages. Published by the Ballard Publishing Co., Crawfordsville, Ind.

JETSAM AND FLOTSAM.

INTERNATIONAL LAW—ENFORCEMENT OF PENAL STATUTES IN FOREIGN COUNTRIES.

The Supreme Court of Texas has recently decided a very interesting point of international law, holding, in Mexican Natl. R. R. Co. v. Jackson, 32 S. W. Rep.

230, that as the laws of Mexico, while making negligence resulting in injury to another a penal offense, also give the injured person a right of action, civil in its nature, the courts of Texas, by enforcing a right of action for personal injuries caused by negligence which accrued in Mexico, do not undertake to enforce a penal law of a foreign country, and therefore do not contravene that principle of international law which forbids the enforcement of such laws by countries other than that of their enactment.

There are probably few rules of law less understood and of more uncertain operation than this one. A general confusion of the technical sense of the word "penal" with its inexact popular usage seems to be almost universal. Within the last few years, the two highest judicial tribunals of the world, the Supreme Court of the United States and the judicial committee of the privy council, have united in condemning this erroneous habit, and have attempted to clearly define the limits of the rule. In Huntington v. Attrill (1893), App. Cas. 150, the latter court, reversing the decision of the Ontario Appeal Court, 18 Ont. App. 136, which affirmed the decree of the court below, 17 Ont. Rep. 245, held that an action to recover a debt due by a corporation from a director thereof, under a statute (Laws N. Y. 1875, ch. 611, § 21), providing that "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof," while "penal" in the loose popular sense of the word, was not so in its international sense, and could be maintained in a foreign jurisdiction. The true doctrine is thus explained by Lord Watson: "The rule has its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or of some one representing the public, are local in this sense, that they are cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the courts of any other country. • • • The phrase 'penal actions' which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic *forum*, does not afford an accurate definition. In its ordinary acceptation, the word 'penal' may embrace penalties for infractions of the general law which do not constitute offenses against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. • • • The expressions 'penal' and 'penalty,' when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceeding for the recovery of penalties, whether exigible by the statute in the interest of the community, or by private persons in their own interest. • • • A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the State whose law has been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offenses against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute in its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis*, pursued, not in his individual interest, but in the interest of the whole community."

This decision was followed, and its reasoning adopted, by the Supreme Court of the United States, in Huntington v. Attrill, 146 U. S. 657, reversing 70 Md. 191, and overruling First Nat. Bank v. Price, 33 Md. 487; Halsey v. McLean, 12 Allen, 438; Derrickson v. Smith, 27 N. J. L. 166, and it may now be considered to be the settled rule in such cases, that no action will be regarded as penal in such a sense as to forbid its maintenance in a foreign jurisdiction, unless it rests upon an offense against the majesty of the State, and not merely against the rights of a private individual and that even if the two exist side by side, the latter will be enforceable in a foreign court, though the former will not.—*American Law Register and Review.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Executors and Administrators—Liability for Interest.—The executor in this case used a part of the trust fund coming to its possession as executor in its own private business of a loan and trust company, but kept no separate accounts of the investments made from the trust fund, or of the interest or profits received or made by reason of such use: Held, that it was properly charged, upon a settlement of its accounts as executor, with interest on so much of the trust fund so used by it at the rate of 7 per cent. per annum.—ST. PAUL TRUST CO. v. KITTSON, Minn., 65 N. W. Rep. 74.

2. ADMINISTRATION—Liability of Administrator.—An executor or administrator cannot bind the estate or make it liable on any promissory note he may make, and the only effect of any such note is to bind himself personally.—GERMANIA BANK OF ST. PAUL v. MICHAUD, Minn., 65 N. W. Rep. 70.

3. APPEAL — Damages. — Rev. St. 1893, ch. 110, § 74, which provides that when appeals from judgments for the recovery of money are dismissed for want of prosecution, or for failing to file authenticated copies of records, as required by law, the court shall enter judgment against the appellants for not less than 5 per cent. nor more than 10 per cent. damages on the amount recovered in the inferior court, does not apply to an appeal from a decree of foreclosure prosecuted by a defendant who is not personally liable for the debt, since as to him it is not a decree "for the recovery of money."—HAMBURGER CO. v. GLOVER, Ill., 42 N. E. Rep. 46.

4. APPEAL—Final Judgment.—A judgment of the appellate court, modifying a decree and remanding the case for further proceedings, the nature of which depends on the option given complainant to amend his bill or allow it to be dismissed, is not appealable, not being a final judgment. — GADE v. FOREST GLEN BRICK & TILE CO., Ill., 42 N. E. Rep. 65.

5. APPEAL—Objections Raised too Late.— Where a judgment of nonsuit is reversed on appeal, defendant on a second appeal cannot for the first time attack the sufficiency of the complaint, it being the same as that on former trial.—DENNIS v. KASS & CO., Wash., 42 Pac. Rep. 540.

6. APPEAL FROM INTERLOCUTORY ORDER.—An appeal from an interlocutory order of the court of common pleas, or a judge thereof, dissolving a provisional injunction allowed in an action, does not transfer the case to the appellant court for trial on the issues joined by the pleadings. The jurisdiction of the appellate court on such appeal is limited to the hearing and decision on the motion to dissolve, although the ultimate relief demanded in the action is a permanent injunction of like purport with the provisional one which was dissolved.—TRUSTEES OF SWAN TP. v. MCCLANNAHAN, Ohio, 42 N. E. Rep. 34.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment in terms preferred rent due on the land of the assignor, who owned no land, except his homestead, which was not assigned, and who owed no rent, except the rent for one month of the store building in which he did business, and for which he had a lease for a term of years: Held, that the assignment did not, in fact, prefer the rent due for the store building, and it was not void because of such preference, under Sanb. & B. Ann. St. § 1693*a*.—KILLMAN v. GREGORY, Wis., 65 N. W. Rep. 53.

8. ATTACHMENT—Exemptions—Partnership Property. —Partnership property cannot be claimed and held by a member of the firm as exempt from execution.—GREEN v. TAYLOR, Ky., 32 S. W. Rep. 945.

9. BAILMENT—Bailee for Hire—Degree of Care.— A dressmaker who receives goods to be made into a dress is a bailee for hire, and must exercise reasonable care and skill in determining whether the cloth should be made up wrong side out.—LINCOLN v. GAY, Mass., 42 N. E. Rep. 95.

10. BANKS AND BANKING—Negotiable Instruments.— A national bank agreed to act as agent of a private banker in paying his checks through the clearing house. The private banker having failed, the bank refused to act for him any longer, but afterwards paid and had indorsed to it one of his checks, which it had guaranteed: Held, that such payment was made as guarantor, and not as agent, and that the bank had the rights of an indorsee of the check.—VOLTZ v. NATIONAL BANK OF ILLINOIS, Ill., 42 N. E. Rep. 69.

11. BROKER—Right to Commissions.—An agent cannot recover commissions for the sale of a boat, where he does not disclose that the company in which he is interested is the actual purchaser, and that the nominal purchaser, who is interested in a contract with the seller dependent on the making of the sale, has offered to give the company a certain amount towards the purchase.— HUMPHREY v. EDDY TRANSP. CO., Mich., 65 N. W. Rep. 13.

12. CARRIERS OF GOODS—Interstate Commerce.—A common carrier transporting freight under a contract for its shipment from one point to another in the same State, and for its delivery on arrival at the latter point to another carrier for transportation out of the State, is engaged in interstate commerce.—HOUSTON DIRECT NAV. CO. v. INSURANCE CO. OF NORTH AMERICA, Tex., 32 S. W. Rep. 889.

13. CARRIERS OF PASSENGERS—Ejection of Passengers. —One who enters a railway train for the purpose of becoming a passenger thereon, but who has no ticket for his passage, and who refuses, when properly demanded by the conductor, to pay the legal fare, becomes a trespasser, and it is his duty, when so requested, to voluntarily leave the train, when it has been stopped at a proper place for that purpose; and a refusal so to do justifies the servants of the railroad company in using such reasonable force to eject him as, under the circumstances, seems to be necessary. The company is not liable in damages for injuries sustained by such person in his being so put off the train when they were not willfully inflicted, when improper methods were not used, and when the wrongful resistance of such person directly contributed to the injuries.—ATCHISON T. & S. F. R. CO. v. BROWN, Kan., 42 Pac. Rep. 588.

14. CEMETERIES—Association — Distribution of Surplus Funds.—The charter of a cemetery association provided that land bought by it for cemetery purposes should be held by it in trust for purposes of interment forever, and that, from the funds obtained from sale of lots, the association should first pay the purchase price of the land and then appropriate a sufficient sum to keep the grounds in repair and good order: Held, that after the association had paid for its land, and had appropriated for its repair and care a sum not alleged to be inadequate, it might distribute the remainder of its fnnds among its members.—BOURLAND v. SPRINGDALE CEMETERY ASS'N, Ill., 42 N. E. Rep. 86.

15. CHATTEL MORTGAGE — Lien—Tender.—The lien of a chattel mortgage is discharged by valid tender of the amount due for which the mortgage is security.—HELPHREY v. STROBACH, Wash., 42 Pac. Rep. 537.

16. CONFLICT OF LAWS—Contract—Usury.—Officers of defendant, a corporation of Tennessee, negotiated a loan with complainant while in Connecticut, it being agreed that it should be secured by mortgage on lands in Tennessee; the money to be paid on arrival of the proper papers in New Jersey, the residence of complainant. The note payable in New Jersey, and the mortgage, were executed by defendant's officers while in a fourth State: Held, that the question whether the note was usurious was determinable by the laws of New Jersey.—HUBBLE v. MORRISTOWN LAND & IMP. CO., Tenn., 32 S. W. Rep. 965.

17. CONSTITUTIONAL LAW — Improvements of Highways.—Act March 15, 1893 (Laws 1893, p. 301), providing for the location and construction of new roads and the improvement and maintenance of old ones, and that the assessment of damages and benefits shall be made

in *ex parte* proceedings, so far as it relates to new roads, violates Const. art. 1, § 16, prohibiting the taking of private property without compensation ascertained by a jury, unless waived.—SENOR V. BOARD OF COM'RS OF WHATCOM COUNTY, Wash., 42 Pac. Rep. 552.

18. CONSTITUTIONAL LAW — Legislative Powers.—Act Feb. 2, 1854, provided that when a legislative officer of the city of Philadelphia should die, or be incapable of fulfilling the duties of his office, his place should be filled by a joint vote of the city councils until the next city election, and the qualification of the successor in office: Held, that a subsequent act, providing that the words "next city election" should be construed to mean the election at which the voters would elect a successor in office had no vacancy occurred therein, was unconstitutional, as seeking to compel the courts to construe the previous act in a way contrary to its letter and spirit.—COMMONWEALTH V. WARWICK, Penn., 33 Atl. Rep. 373.

19. CONSTITUTIONAL LAW—Statutes — Construction.—Const. Amend. art. 7, § 1, authorizes registry voters to vote at town meetings on all questions, except on the election of a city council, and propositions for imposing a tax or expending money. P. L. ch. 447, provides that school districts may be abolished "at any town meeting," and that thereupon the school property of the several districts shall vest in the town, and a tax be levied to pay each district for the property taken: Held, that such law was not unconstitutional in authorizing registry voters to vote on a proposition imposing a tax or expending money.—IN RE SCHOOL COMMITTEE OF TOWN OF JOHNSTON, R. I., 33 Atl. Rep. 369.

20. CONTRACT — Agent — Personal Liability.—A husband negotiating a lease of his wife's land is not liable to the proposed lessee for failure of the wife to execute the lease, where the lessee was aware that the husband was merely acting as adviser to his wife as to the terms she should require.—BAER V. BONYNGE, N. Y., 42 N. E. Rep. 31.

21. CONTRACT — Performance.—Where one party to the contract, before the time for performance by the other has arrived, consents on his request to extend the time of performance, until he gives notice of withdrawal he is estopped to consider the latter in default though meanwhile the contract time has elapsed.—THOMSON V. POOR, N. Y., 42 N. E. Rep. 13.

22. CONTRACT IN RESTRAINT OF TRADE — Damages.—The contract by which defendant, on selling to plaintiff his business, covenanted, "under a penalty" of a certain amount, not to engage in competition with him, having been drawn by plaintiff's attorney, and signed by defendant without reading, will be held to provide a penalty, and not liquidated damages, in the absence of strong evidence to show a contrary intention.—SMITH V. BROWN, Mass., 42 N. E. Rep. 101.

23. CONVERSION — Demand.—A complaint alleging that defendants, being in possession of property, converted the same to their own use, need not allege demand and refusal.—DAGGETT V. GRAY, Cal., 42 Pac. Rep. 568.

24. CORPORATION — Insurance Companies.—Where an insurance company incorporated under the laws of this State issued a fire insurance policy to parties in another State, insuring fixed property in that State, such corporation is subject, in an action upon such policy, to the laws of that State as to the service of process upon such corporation.—GUDE V. DAKOTA FIRE & MARINE INS. CO., S. Dak., 65 N. W. Rep. 27.

25. CORPORATIONS — Liability of Stockholders. — The books of a corporation furnish evidence as to what persons are entitled to the rights and privileges of stockholders, and as to whom creditors may look for payment in the event of the insolvency of the corporation, and creditors of the corporation are presumed to have relied upon the books.—UNITED STATES WIND-ENGINE & PUMP CO. V. DAVIS, Kan., 42 Pac. Rep. 590.

26. CORPORATION — Service of Process.—In an action against a private corporation the return of the sheriff must affirmatively show that service was made upon an officer of an agent of the corporation specified in the statute as one upon whom service may be made.—MARS V. ORO FINO MIN. CO., S. Dak., 65 N. W. Rep. 19.

27. CRIMINAL EVIDENCE—Embezzlement.—Where the by laws of a corporation provide that the secretary, besides certain specified duties, shall perform such other duties as the directors require, on prosecution of the secretary for embezzlement, evidence of usage and custom are admissible to show that the money came to his possession by virtue of his employment.—STATE V. SILVA, Mo., 32 S. W. Rep. 1007.

28. CRIMINAL EVIDENCE — Impeaching Prosecuting Witness.—Where, on prosecution for bastardy, the prosecuting witness testifies that the defendant is the father of the child, which defendant denies, and on cross examination she testifies that she never had intercourse with any other man, evidence of intercourse with other men at or about the time she testified that the child was begotten is admissible to impeach her.—STATE V. PERKINS, N. Car., 23 S. E. Rep. 274.

29. CRIMINAL EVIDENCE — Lottery — Constitutional Law.—The constitutional provision that no one shall be compelled to testify against himself in a criminal case does not render inadmissible in evidence, in a prosecution for establishing a lottery, tickets and lottery material of the accused unlawfully seized by an officer without authority from the court. — STATE V. POMEROY, Mo., 32 S. W. Rep. 1002.

30. CRIMINAL EVIDENCE — Malicious Shooting. — On trial for maliciously shooting at D, without wounding him, evidence that defendant, after his arrest, and when told that he had shot at D, and had shot Mrs. D, stated that he was sorry that he did not "get" them both, was admissible, though irrelevant as to Mrs. D, since the statement was not severable, so as to show regret merely for not shooting D.—COGSWELL V. COMMONWEALTH, Ky., 32 S. W. Rep. 935.

31. CRIMINAL LAW—Appeal—Death of Stenographer. —The fact that the stenographer who took the evidence in a criminal case died before he could transcribe it does not warrant the reversal of a conviction, as due diligence required defendant's counsel when discovering that the stenographer was dangerously ill, to have preserved the evidence in some other way, either by memory or by calling on the witness who testified on the trial.—STATE V. THOMPSON, Mo., 32 S. W. Rep. 975.

32. CRIMINAL LAW—Appeal Bond.—An appeal bond in a criminal case, which binds defendant to "abide the judgment of the court of appeals," instead of the judgment of "the court of criminal appeals," is fatally defective.—IRVIN V. STATE, Tex., 32 S. W. Rep. 899.

33. CRIMINAL LAW—Assault with Intent to Rape.—Rev. St. 1889, § 3490, fixes the maximum punishment for assault with intent to rape at five years' imprisonment in the penitentiary, but fixes no minimum imprisonment. Section 3955 provides, generally, that no person shall in any case be sentenced to imprisonment in the penitentiary for any term less than two years: Held, that such sections are not conflicting, and that the minimum punishment for assault with intent to rape is imprisonment for two years.—STATE V. SCHOLL, Mo., 32 S. W. Rep. 969.

34. CRIMINAL LAW — Burglary.—Under Laws 1893, ch. 63, making the possession of burglars' tools adapted to break open places of deposit, in order to take therefrom any money or property, with intent to use them for such purpose, an offense, an information alleging possession with the intent to break open places of deposit in general, and take property therefrom, without specifying any particular place or property, is sufficient.—SCOTT V. STATE, Wis., 65 N. W. Rep. 61.

35. CRIMINAL LAW — Conviction of Lower Crime.—A person indicted for and convicted of murder in the second degree cannot complain that the evidence showed that he was guilty of murder in the first degree.—STATE V. SCHIELLER, Mo., 32 S. W. Rep. 976.

36. CRIMINAL LAW — Embezzlement by Partner.—It is no defense to a prosecution for the embezzlement of goods consigned on commission that defendant paid over the money arising on a sale thereof to his partner.—STATE v. CROSSWHITE, Mo., 32 S. W. Rep. 991.

37. CRIMINAL LAW — False Pretenses.—In a prosecution for obtaining money by false representations as to the value of the mortgage security given, to prove that the lender did not rely on the mortgage, evidence as to the financial condition of an indorser thereon at the time of the maturity of the note is inadmissible.—VAN BUREN v. PEOPLE, Colo., 42 Pac. Rep. 599.

38. CRIMINAL LAW — Forgery—Indictment.—Rev. St. 1889, § 3634, provides that every person who shall sell any forged instrument for any consideration, etc., shall be guilty of forgery: Heid, that an indictment failing to allege that the forged instrument was sold for a consideration was insufficient.—STATE v. HESSELTINE, Mo., 32 S. W. Rep. 983.

39. CRIMINAL LAW—Incest — Indictment.—An indictment for incest, alleging that defendant had carnal knowledge of F, and was the father of F, need not allege that F was a female, or the daughter of defendant. —WAGGONER v. STATE, Tex., 32 S. W. Rep. 896.

40. CRIMINAL LAW — Indictment—Variance.—A variance between the purport and tenor clauses of an indictment for forgery, as to the persons by whom the forged instrument was executed, is fatal.—CAMPBELL v. STATE, Tex., 32 S. W. Rep. 899.

41. CRIMINAL LAW—Introduction of Evidence.—Under Code Cr. Proc. art. 661, permitting testimony to be introduced at any time "before the argument of the case is concluded," if it appears necessary, it is reversible error to admit evidence after conclusion of the arguments.—WILLIAMS v. STATE, Tex., 32 S. W. Rep. 893.

42. CRIMINAL LAW—Larceny—Ownership of Property. —In a prosecution for the larceny of a cow, evidence that the person alleged to have been the owner had the exclusive management and control of it, is sufficient proof of ownership, though another person was the actual owner of the cow.—LEDBETTER v. STATE, Tex., 32 S. W. Rep. 903.

43. CRIMINAL LAW— Lotteries —Possession.— Policy slips found on defendant's person after his arrest are admissible in a prosecution brought under St. 1895, ch. 419, for having such slips in his possession for sale though the original arrest was made for another offense.—COMMONWEALTH v. GORMAN, Mass., 42 N. E. Rep. 94.

44. CRIMINAL LAW—Rape—Punishment.—Under Rev. St. 1889, § 4230, providing that, "where the jury find a verdict of guilty and fail to agree on the punishment or do not declare such punishment by their verdict," the court shall assess the punishment, the court can assess the punishment only on failure of the jury; and it was error to charge on trial for rape that, if defendant was found guilty, "you will assess his punishment at death, or imprisonment in the penitentiary," etc.—STATE v. GILBREATH, Mo., 32 S. W. Rep. 1026.

45. CRIMINAL LAW— Robbery—Indictment. — Under Rev. St. 1889, § 3530, defining robbery in the first degree as taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of immediate bodily injury, an indictment which charges that the act was done violently, and against the will of the person robbed, is sufficient, without alleging a putting in fear.—STATE v. LAWLER, Mo., 32 S. W. Rep. 979.

46. CRIMINAL TRIAL—Larceny — Good Character — Possession of Stolen Goods.—A charge that, in order to convict, the evidence should be so convincing as to lead the mind to the conclusion that the accused "cannot be guiltless," is properly refused. — WEBB v. STATE, Ala., 18 South. Rep. 491.

47. DEED—Action on Covenant of Warranty.—In a suit against a warrantor on covenants in a deed wherein the plaintiff claims that he was evicted from the property in question because he had yielded the possession thereof to a paramount title, it is incumbent on him to show, not only that he yielded possession of the property to what he supposed or was claimed to be the paramount title, but that the title to which he had thus yielded was in fact paramount to the title of any one else.—WALKER v. KIRSHNER, Kan., 42 Pac. Rep. 596.

48. DEED — Conveyance of Water Right. — A deed containing no reference to a ditch which supplies water to the land conveys no interest in the ditch.—CHILD v. WHITMAN, Colo., 42 Pac. Rep. 601.

49. DEED—Parol Evidence.—Parol evidence is inadmissible to show that a deed absolute, and admitting the receipt of the money consideration expressed, was in fact a deed on condition subsequent, that the grantee should support the grantor for life, and thereby render the estate liable to forfeiture for failure of the grantee to comply with the condition.—BYARS v. BYARS, Tex., 32 S. W. Rep. 925.

50. DEED AS MORTGAGE — Evidence. — An absolute deed should not be held to be a mortgage, where the title conveyed is not one on which a loan could be readily obtained, a valuable consideration is shown, and the evidence as to the deed being given merely as security is conflicting.—MAY v. MAY, Ill., 42 N. E. Rep. 56.

51. DOWER—Inchoate Right—Action by Wife.—Where land in which a wife has an inchoate right of dower is conveyed by the husband and one personating the wife by duly recorded deed releasing dower, the wife may sue in her own name to set aside the deed.—CLIFFORD v. KAMPFE, N. Y., 42 N. E. Rep. 1.

52. DRAINAGE — Sewer — Nuisance. — Where a village constructs a sewer that empties the village sewage into a natural water-course outside the village limits, the owner of the land across which such water-course runs cannot enjoin the construction and use of such drain, unless it is proved to be a nuisance.—ROBB v. VILLAGE OF LA GRANGE, Ill., 42 N. E. Rep. 77.

53. ELECTIONS — Marking Ballots. — When a cross is made in the circle at the head of a party ticket, and no name thereon erased, crosses at the left of the names of candidates thereon are without effect, and should be disregarded.—MCKITTRICK v. PARDEE, S. Dak., 63 N. W. Rep. 23.

54. ELECTION CONTEST—Second Recount—Ballots.—A recount in a contested election case should not be rejected merely because the ballots were not placed in the vault in the county clerk's office, and there was possible opportunity to tamper with them; but, as between the canvass by the election officers and the ballots themselves, the ballots were the best evidence, provided they have been kept in the manner required by law, and have not been tampered with.—HONE v. WILLIAMS, Mo., 32 S. W. Rep. 1016.

55. EVIDENCE — Books of Account.—The payment by a surety of the debtor's obligation may, for the purpose of showing indebtedness of the deceased debtor to the surety, be proven by entries on the books of the creditor in his handwriting, he being dead.—SANDS v. HAMMEL, Ala., 18 South. Rep. 489.

56. EVIDENCE — Expert Testimony.—The refusal to permit a witness who has testified that he is a professor of civil engineering, and has made the law of moving bodies a study, and can tell how far a train will move by its momentum, to testify as an expert as to the distance such train would travel, in order to contradict the testimony of other witnesses testifying from practical experience, will not be disturbed on appeal.—BLUE v. ABERDEEN & W. R. R. CO., N. C., 23 S. E. Rep. 275.

57. FRAUDS, STATUTE OF — Parol Contract.—A parol contract between the owners of separate tracts of land, by which they agree to sell them, and divide the profit equally, is void under the statute of frauds, as being an agreement to convey an interest in land.—GOLDSTEIN v. NATHAN, Ill., 42 N. E. Rep. 72.

58. FRAUDULENT CONVEYANCE—Trust Deed.—A trust deed by a corporation to a bank will not be set aside as in fraud of creditors on the ground that two of the notes secured by such deed were executed by directors as individuals, where it appears that the whole debt secured was a corporate debt, and that the notes were so executed to avoid violating a law forbidding the bank to loan more than a stated sum to one individual or corporation.—ALLEN V. DAYTON HOTEL CO., Tenn., 32 S. W. Rep. 962.

59. HIGHWAYS—Prescription.—The building of a fence by the owner across a roadway through his land, and the maintenance thereof until it was removed by the sheriff on an order of court, will interrupt the running of the statute of limitations in favor of the county.—CUNNINGHAM V. SAN SABA COUNTY, Tex., 32 S. W. Rep. 928.

60. HUSBAND AND WIFE — Community Property.—Where a husband told his wife, who was about to engage in the business of keeping boarders, that whatever money she made should be her separate property, and afterwards paid his own board, personal property purchased by the wife with the profits of the business, and taken possession of by her with the husband's consent, is not subject to his debts accruing after such property was obtained.— YAKE V. PUGH, Wash., 42 Pac. Rep. 528.

61. HUSBAND AND WIFE—Insurance on Life of Husband—Premiums.—Where the premiums of an insurance policy on the life of a husband, payable "as directed by will," are paid out of the community estate, the wife is, on death of the husband, entitled to one-half the proceeds of the policy, though his will makes the entire proceeds payable to his own estate.—MARTIN V. MORAN, Tex., 32 S. W. Rep. 904.

62. HUSBAND AND WIFE—Possession by Husband of Wife's Land.—Where a husband and wife live on her land, and he does such acts merely as grow out of the marital relations, and which must exist in every case where a husband lives with his wife in her home on her land, he does not have such possession as will constitute a covenant for quiet enjoyment, etc., contained in their deed of such land, a covenant by him running with the land which inures to the covenantee's grantee.—MYGATT V. COE, N. Y., 42 N. E. Rep. 17.

63. INJUNCTION—Contempt of Court.—An injunction which forbids the defendant from corresponding in any manner with complainant's customers is violated by defendant if he writes to such customers, even though he does so in answer to letters written to him by them.—LOVEN V. PEOPLE, Ill., 42 N. E. Rep. 82.

64. INJUNCTION—Ejectment.—An injectment suit by a county will not be enjoined because of a contract whereby the county gave the defendant in ejectment possession of the land, where such contract is valid in form, and is questionable only as being possibly contrary to an express statutory prohibition, since the contract, if void, should not be enforced in equity, and, if valid, constitutes an adequate defense to the action of ejectment.—COOK COUNTY V. CITY OF CHICAGO, Ill., 42 N. E. Rep. 67.

65. INSURANCE—Conditions—Waiver.—Where a policy is taken in the name of a trustee on the advice of the agent of the insurer, the agent being aware at the time that the property is held in trust, and that the premium is paid by the *cestui que trust*, the insurer cannot claim a forfeiture of the policy under a condition avoiding the same unless the interest of the insured is unconditional and sole ownership, though the policy provides that no condition thereof can be waived by an agent except in writing indorsed on the policy.—RHODE ISLAND UNDERWRITERS' ASS'N V. MONARCH, Ky., 32 S. W. Rep. 959.

66. JUDGMENT—Res Judicata.— The joining, as defendants to a suit, persons not parties to a former suit, and who have no interest in the subject-matter, does not change the identity of the parties in the two suits so as to prevent a decision in the former from being *res judicata* in the latter.—NEPPACH V. JONES, Oreg., 42 Pac. Rep. 519.

67. JUDGMENT ON PLEADING.—Where a petition states an equitable cause of action in favor of the plaintiff, but, because of the failure to allege certain facts therein, it appears that there is a defect of parties plaintiff, and after a general demurrer thereto has been overruled an answer is filed, which supplies the allegations which should have been set out in the petition, held, that a motion by the defendant for judgment in its favor on the pleadings was properly overruled.—CHICAGO, ETC. R. CO. V. GERMAN INS. CO. OF FREEPORT, ILL., Kan., 42 Pac. Rep. 594.

68. LANDLORD AND TENANT—Assignment of Lease.—Where a lessee, with the landlord's consent, assigns the lease, but expressly covenants in the assignment that nothing therein shall alter his liability on the covenants, including that for rent, he does not become a mere surety for payment of rent by the assignee, but is primarily liable therefor.—LATTA V. WEIS, Mo., 32 S. W. Rep. 1005.

69. LIBEL—Justification.—A publication in a paper, charging an attempt to bribe a State senator, is not privileged.—OWEN V. DEWEY, Mich., 65 N. W. Rep. 8.

70. LIMITATIONS—Covenants — Warranty. —Where a grantor who has no title gives a deed of general warranty, limitation does not run in his favor till his grantee's title is assailed by assertion of a good title.—ALVORD V. WAGGONER, Tex., 32 S. W. Rep. 872.

71. LIMITATIONS—Fraud—Contract.— Defendant sold plaintiff a certain medicine compound and the good will of the business, and agreed not to sell any of the same medicine in a certain locality. Subsequently, he secretly engaged with another person in the sale of the same compound, under a different name: Held, that plaintiff's action for breach of the contract was one "for relief on the ground of fraud" (Code Civ. Proc. § 338), and the statute of limitations therefore did not begin to run against such action until after discovery of the fraud.—GREGORY V. SPIEKER, Cal., 42 Pac. Rep. 576.

72. LIMITATIONS—Mortgage.— A mortgage executed to plaintiff in consideration for the paymant by plaintiff of a debt due by the mortgagor, and assigned to plaintiff, interrupted the running of limitations on the debt.—HAMPTON V. FRANCE, Ky., 32 S. W. Rep. 950.

73. LIMITATION OF ACTIONS—Fraud.—The statutory limitation of the time within which "an action for relief on the ground of fraud" must be commenced only applies when the party against whom the bar of the statute is interposed is required to allege fraud in pleading his cause of action, or to prove fraud to entitle him to relief. — BROWN V. CLOUD COUNTY BANK, Kan., 42 Pac. Rep. 593.

74. MASTER AND SERVANT—Assumption of Risk.—A servant assumes the ordinary risks incident to his employment, and also risks arising in consequence of special features of danger known to him, or which he could have discovered by the exercise of reasonable care, or which should have been observed by one ordinarily skilled in the employment in which he engages.—WESTERN UNION TEL. CO. V. MCMULLEN, N. J., 33 Atl. Rep. 884.

75. MASTER AND SERVANT — Fellow-servant— Negligence.—A master, having furnished sufficient suitable material, is not liable for injuries to a servant resulting from the negligence of a fellow-servant in putting a defective plank into a scaffold, though the scaffold was erected before the injured servant entered the master's service.—O'CONNOR V. RICH, Mass., 42 N. E. Rep. 111.

76. MECHANICS' LIENS — Contract.—Where, in an action to foreclose mechanics' liens, it conclusively appears from the record that credit was given to the party in possession of the property under an option to purchase, and not to the owner of the property, such liens will not, on the failure of the party in possession, and to whom credit was given, to fulfill his contract, and avail himself of the option, be enforceable against

the owner or his property.—STEEL v. ARGENTINE MIN. CO., Idaho, 42 Pac. Rep. 585.

77. MECHANIC'S LIEN—Priorities.—Where a vendor's lien on land is released in favor of a mortgage to secure money for building on the land, and a mechanic's lien consequently attaches, the claimant knowing that the money loaned is to be used in erecting the building, the mortgage will, to the amount of the unpaid purchase price secured by the vendor's lien, be a first, the full amount of the mechanic's lien a second, the balance due on the mortgage a third, and the vendor's lien a fourth, lien on the land.—LEMING v. STEPHENS, Tenn., 32 S. W. Rep. 961.

78. MECHANIC'S LIEN — Waiver.—The plaintiffs became entitled to a lien on a house and curtilage, for materials furnished to the builders and used in the construction of the house. Afterwards, in order to secure the plaintiffs for the price of these materials and for other debts, the builders assigned to them all their rights under the contract between the builders and the owner for the erection of the house, and under other contracts, to hold until the debts were paid: Held, that by accepting the assignment the plaintiffs had not lost or impaired their lien for materials.—TALIAFERRO v. STEVENSON, N. J., 33 Atl. Rep. 383.

79. MECHANIC'S LIEN LAW — Constitutionality.—The mechanic's lien law, by providing in section 3 (Rev. St. 1894, § 7257), that a lien may be established on any property for work by filing within 60 days "after" the work is done or materials furnished, without requiring previous notice to the property owner that the work is to be done, does not deprive the owner of his property without due process of law.—SMITH v. NEWBAUER, Ind., 42 N. E. Rep. 40.

80. MINES—Liens.—The fact that a particular description by metes and bounds, of a mining claim, in a notice of a lien, is incorrect, will render the notice invalid.—FERNANDEZ v. BURLESON, Cal., 42 Pac. Rep. 566.

81. MORTGAGE — Cancellation of — Intoxication of Mortgagor.—A mortgage executed by one so intoxicated as to be without consenting capacity will be set aside.—HALE v. STERY, Colo., 42 Pac. Rep. 598.

82. MORTGAGE — Merger—Notice.—Where the holder of a conveyance that is in fact only a mortgage conveys to his wife, and fraudulently induces the mortgagor to convey to her also, he acting as his wife's agent, and being advised of all the equities of the mortgagor, his wife is not an innocent purchaser for value, nor does the mortgage merge in her title, since she is chargeable with notice to her husband and agent.—MILLER v. WHELAN, Ill., 42 N. E. Rep. 59.

83. MORTGAGES — Subrogations.—Where money is loaned to pay off a first mortgage on the representation of the borrower that the land is unincumbered except as to such mortgage, the lender will be subrogated to the rights of the first mortgagee as against a second mortgagee, who was ignorant of the transaction, even after such first mortgage is paid and delivered up to the mortgagor, and such lender has foreclosed his mortgage and taken possession.—UNION MORTGAGE BANKING & TRUST CO. v. PETERS, Miss., 18 South. Rep. 497.

84. MUNICIPAL CORPORATIONS — Contracts—Purchase of Waterworks.—Tacoma City Charter, § 52, authorizes the city, by ordinance, to provide for purchasing waterworks. Section 46 provides that no ordinance shall be amended except by a new ordinance, which shall contain the ordinance amended. An ordinance for the purchase of the waterworks and all personal property owned by a company was passed, and ratified by the vote of the citizens, such ratification being necessary because of the amount of the indebtedness to be incurred: Held, that the proposition, as ratified by the voters, in determining the property purchased from the company, controlled a schedule of the property conveyed, made by the company, and accepted by the city officials.—TACOMA LIGHT & WATER CO. v. CITY OF TACOMA, Wash., 42 Pac. Rep. 533.

85. MUNICIPAL CORPORATIONS — Contracts for Lighting Streets.—A complaint, in an action by a taxpayer to restrain a town from making a certain contract for lighting the streets of the town by gas, which merely alleges that the town is to pay three times as much for the gas used by it as individuals pay for gas used by them, does not show that the contract is fraudulent.—SEWARD v. TOWN OF LIBERTY, Ind., 42 N. E. Rep. 39.

86. MUNICIPAL CORPORATION—Fire Department—Negligence.—Members of a fire department are not servants of the city appointing them, but of the general public, so that the city is not liable for an injury to one of them through the negligence of another, though the city council may have selected the latter knowing he was incompetent; and it is immaterial that the city has a special charter.—SHANEWERK v. CITY OF FT. WORTH, Tex., 32 S. W. Rep. 918.

87. MUNICIPAL CORPORATION — Powers—Submission to Arbitration.—Unless restrained by positive enactment, municipal corporations may submit disputed claims to the arbitration of referees; and they are as much bound by such submissions, and the awards thereon, as are natural persons.—SMITH v. BOROUGH OF WILKINSBURG, Penn., 33 Atl. Rep. 371.

88. MUNICIPAL CORPORATION—Void Ordinance — Act of Police Officer.—A city is not liable for the act of a police officer in making an arrest for a breach of the peace under a void ordinance.—TAYLOR v. CITY OF OWENSBORO, Ky., 32 S. W. Rep. 948.

89. NEGLIGENCE — Assumption of Risk.—Where an employee, while pushing a hand car on a trestle, the planks of which were laid crosswise, extending beyond the rails, was killed by being thrown from the trestle by the breaking of a plank just outside the rail, the question of his contributory negligence in stepping outside of the rail was properly submitted to the jury, though he was warned by his foreman, and cautioned by a fellow-workman, to walk inside the rails.—HOULIHAN v. CONNECTICUT RIVER R. CO., Mass., 42 N. E. Rep. 108.

90. NEGLIGENCE—Independent Contractor.—One who employs another to furnish the materials and do a specific job as an independent contractor is not liable for injuries caused by the negligence of such contractor or his servants.—CARLSON v. STOCKING, Wis., 65 N. W. Rep. 58.

91. NEGOTIABLE INSTRUMENT—Accommodation Notes.—Where two parties exchange accommodation notes with the understanding that each shall hold the other harmless for notes discounted by him, one of them who has duly paid all notes given him by the other has a good defense on the notes given by him, as against one who is not an innocent holder for value.—WOLVERTON v. GEORGE H. TAYLOR & CO., Ill., 42 N. E. Rep. 49.

92. NEGOTIABLE INSTRUMENTS — Indorsement and Transfer.—The indorsee of a promissory note indorsed it "for discount and credit of himself." Before maturity, he took it out of the bank which discounted it for him, and passed it away with this special indorsement: Held, that the person to whom it was so passed acquired a valid title under such indorsement.—BROOK v. VAN NEST, N. J., 33 Atl. Rep. 382.

93. NEW TRIAL—Imposing Conditions.—The court, in granting a motion for a new trial, may, in its discretion, require the moving party to pay the other party's counsel fees and expenses necessarily incurred in such motion.—BROOKS v. SAN FRANCISCO & N. P. RY. CO., Cal., 42 Pac. Rep. 570.

94. PARENT AND CHILD—Support of Child.—A relative, to recover from a father for the care and support of his minor child, must show that the services were rendered at his request.—JACKSON v. MULL, Wy., 42 Pac. Rep. 603.

95. PARTNERSHIP—Assignment.—Where a partner, in contemplation of insolvency, absconds, a voluntary assignment by his copartners on finding the business insolvent is valid.—VOSHMIK v. HARTMANN, Wis., 65 N. W. Rep. 60.

96. PLEDGE—Note as Collateral.—Under Rev. St. art. 272, providing that defendant, in an action on any written instrument, may plead failure of consideration as against a transferee, or "when defendant may prove a knowledge of such want or failure of consideration on the part of the holder prior to the transfer," defendant, in an action by a transferee on a note pledged to the transferror, as collateral to secure advances to defendant, who pleads that such advances were never made, and that the payee agreed not to transfer the note, and that plaintiff had notice of such facts before the transfer, has the burden of showing such notice.—WRIGHT v. HARTIE, Tex., 32 S. W. Rep. 885.

97. POWER OF ATTORNEY—Construction.—Defendants' grantors executed an irrevocable power of attorney to plaintiff's deceased husband, "to demand, sue for, recover, enter into, and take possession of" certain lands in Texas, and in consideration of such services as attorney the grantee was "to have and retain to himself one-half of all the lands described and contemplated in the power of attorney," etc. Deceased never acted under this power, and after his death the grantors conveyed the lands, as their own, to defendants: Held, that the instrument was an executory contract only, and, never having been acted upon, deceased acquired no interest in the lands.—TAYLER v. TAUL, Tex., 32 S. W. Rep. 866.

98. PROCESS—Summons by Publication—Judgment.—A judgment against a non-resident on service of summons by publication is void, where the record fails to recite that the court, prior to the publication, obtained jurisdiction of his property by attachment process. — WILLAMETTE REAL-ESTATE CO. v. HENDRIX, Oreg., 42 Pac. Rep. 514.

99. PUBLIC LANDS—Conveyances — Adverse Possession.—A conveyance by one who has made a valid location and survey vests his grantee with the legal title, and a subsequent deed from the same grantor to another, after the patent has been issued, will not connect the grantee therein with the sovereignty of the soil, so as to make the three-years statute of limitations applicable to possession under said second deed.—ILLIES v. FRERICHS, Tex., 32 S. W. Rep. 915.

100. QUIETING TITLE—Burnt Record Act.—Under Rev. St. 1893, ch. 116, § 13, which declares that in suits under the burnt record act a sworn answer shall have no other or greater weight as evidence than the petition, such an answer is not evidence as in ordinary equity suits.—MILLER v. STALKER, Ill., 42 N. E. Rep. 79.

101. RAILROAD COMPANIES—Accident at Crossings—Negligence.—A judgment against a railway company for death of plaintiff's decedent, in a collision at a crossing, will be reversed where the only evidence of the care exercised by decedent was the testimony of a witness that he saw plaintiff when 27 feet from the track, driving in a slow walk; that, at the time, he was looking in the opposite direction from which the train was approaching; that he continued to so look up to the time he was struck by the train, unless for a short time when his view of decedent was obstructed by a building.—CINCINNATI, H. & I. R. Co. v. DUNCAN, Ind., 42 N. E. Rep. 37.

102. RAILROAD COMPANY—Assault by Depot Policeman on Passenger.—A railroad company, which employs a policeman at a depot to look after passengers, is liable to a passenger for loss of an eye, caused by the policeman striking him with a billy, the passenger having, after being roused from a drunken sleep, and started to his train, merely attempted to come back into the depot.—TEXAS & P. RY. CO. v. BOWLIN, Tex., 32 S. W. Rep. 918.

103. RAILROAD COMPANY—Fires.—In an action against a railway company for damages from fire communicated by its engine, where the evidence was that, five days before the fire shortly after the passage of defendant's train, a fire started in a stack, and that for five days fire and smoke were seen there, and that the fire for which plaintiff claimed damages was supposed to have started from such first fire, but there was not evidence of such fact, a nonsuit was proper.—STRATTON v. UNION PAC. RY. CO., Colo., 42 Pac. Rep. 602.

104. RAILROAD COMPANIES—Fires—Possession—Title.—Possession is *prima facie* proof of title, in an action against a railroad company for negligently setting fire to property.—SPIRLOCK v. PORT TOWNSEND SOUTH R. CO., Wash., 42 Pac. Rep. 520.

105. RAILROAD COMPANIES—Injuries—Throwing Mail Pouch.—Railway companies are liable for injuries to persons rightfully on its depot platform, who are struck by a mail pouch thrown from a rapidly moving train.—WILLIAMS v. LOUISVILLE & N. R. Co., Ky., 32 S. W. Rep. 934.

106. RAILROAD COMPANIES— Negligence — Contributory Negligence.—Contributory negligence is never a question of law unless the facts are such that all reasonable men must draw the same inference therefrom.—EICHHORN v. MISSOURI, K. & T. RY. CO., Mo., 32 S. W. Rep. 993.

107. RAILROAD COMPANY — Injury to Volunteer. — Plaintiff's husband was an employee of a coal company, and was engaged in loading coal from an elevated platform, through a chute to a car on defendant's tracks. The chute was so applied to the car that any abrupt movement of the latter would injure it. Defendant caused a "flying switch" to be made, with great speed, from the main track to the side track upon which the car was being loaded. Plaintiff's husband, whose duty it was to protect the chute, not appreciating the speed of the approaching cars, climbed on an intervening box car to set the brakes and intercept the collision with the coal car, and was thrown down by the collision and killed: Held, that plaintiff was not prevented from recovering on he ground that he was a volunteer.—WETHERFORD M. W. & N. W. RY. CO. v. DUNCAN, Tex., 32 S. W. Rep. 878.

108. RAILROAD COMPANIES— Officers— Limitations.—Where a by-law of a railroad company provided that the first vice-president should have general charge of the passenger and freight traffic, and appoint and remove at pleasure the officers of those departments, and that was his sole source of authority, he had no power to appoint plaintiff for a fixed period as "general passenger and ticket agent," whose duty it was to take entire charge of all passenger matters.—MISSOURI, K. & T. RY. CO. v. FAULKNER, Tex., 32 S. W. Rep. 883.

109. RAILROAD COMPANIES— Parent and Child—Contributory Negligence.—In an action against a railroad company for causing the death of a child 21 months old, the evidence showed that the child and its parents lived in the station adjoining the track; that at the time of the accident the father was away from the station, attending to his business; that the mother left the child in one room of the station, while she went into another room to attend to another child, who was ill; and that during that time the child went out upon the track, and was killed by a passing train: Held, that the parents were not, as a matter of law, guilty of contributory negligence.—CHICAGO & A. R. Co. v. LOGUE, Ill., 42 N. E. Rep. 53.

110. RECEIVERS—Contract of the Insolvent.—A receiver of a corporation may refuse to carry out a contract entered into by the corporation, without being liable for damages for its breach, as otherwise liabilities of the corporation on executory contracts would become preferred claims.—SCOTT v. RAINIER POWER & RAILWAY CO., Wash., 42 Pac. Rep. 531.

111. RECEIVERS—Receiver of Corporation—Authority to Appoint.—A court has no power, pending an action against a corporation, to displace the corporate management, and put in its place a receiver and the court, in the absence of a statute giving it such power.—FISCHER v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Cal., 42 Pac. Rep. 561.

112. RES JUDICATA — Material Issues.—Where issue has been joined on a material fact in an action, and

the issue judicially determined and carried into judgment by a court having jurisdiction of the action, the parties to such action are concluded by such finding until the judgment is reversed or set aside; and the fact thus established cannot be retried by the same parties in any subsequent action, whether the second action is upon the same or a different subject-matter from the first. In this respect it is immaterial that one of the actions may have been *ex contractu*, and the other *ex delicto*.—HIXSON v. OGG, Ohio, 42 N. E. Rep. 32.

113. SALE BY INSOLVENT — Bona Fide Purchaser.—Though a sale by an insolvent was *prima facie* fraudulent, a finding that the vendee purchased in good faith will not be disturbed on evidence, though conflicting, that the vendee had no knowledge of the vendor's insolvency, that the price agreed upon was the fair value of the property, and that he afterwards offered to make the deferred payments to the vendor's assignee.—GRUNSKY v. PARLIN, Cal., 42 Pac. Rep. 575.

114. SALE OF CORPORATE STOCK—Fraud—Limitations.—Where defendant, in 1865, procured the sale of oil stock by false representations that oil lands belonging to the company were being tested with prospects of success, whereas they had been tested and found to be non-producing, the fact that plaintiff was a business man residing in the same city as the officers of the company, and could have found out by inquiry that the company had stopped work, and the fact that no dividends or assessments were made on the stock, and, as a result, plaintiff, in 1871, considered his stock worthless, will not start the running of limitation from such date against an action to rescind the sale, as from a discovery of the "facts constituting the fraud," within Code, § 382, subd. 5, limiting actions other than for money, based on fraud, to six years from the accrual of the action.—HIGGINS v. CROUSE, N. Y., 42 N. E. Rep. 6.

115. STATUTE — Construction of Statute — "Calendar Month."—The term "calendar month," whether employed in statutes or contracts, and not appearing to have been used in a different sense, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof.—MCGINN v. STATE, Neb., 65 N. W. Rep. 46.

116. TELEGRAPH COMPANIES — Limiting Liability.—The statutory obligation and common law liability of a telegraph company to accept, safely transmit, and promptly deliver a message is in no manner modified, limited, or intrinsically affected by a regulation in all respects reasonable, which requires the sender to present in writing a claim for damages within 60 days after the message is filed with the company for transmission; nor does such regulation shorten the time within which an action for damages may be commenced.—KIRLEY v. WESTERN UNION TEL. CO., S. Dak., 65 N. W. Rep. 37.

117. TELEGRAPH COMPANY—Telegram—Negligence.—Though the sender of a telegram, in making special arrangements for the delivery of an answer, was negligent in failing to give the precise address of the sendee, but left a sum sufficient to pay for the delivery of such answer, the company will not be excused from negligence in delivering the message to another than the addressee, and failing to elicit an answer.—SHERRILL v. WESTERN UNION TEL. CO., N. Car., 23 S. E. Rep. 277.

118. TRADE MARK — Good Will.—A trade-mark is a notice indicating origin. It cannot exist—that is, be the subject of ownership—apart from a business, or the good will thereof.—ROYAL BAKING POWDER CO. v. RAYMOND, U. S. C. C. (Ill.), 70 Fed. Rep. 376.

119. TRESPASS—Defense.—In trespass, defendants are entitled to the benefit of the evidence brought out by plaintiff that they were agents of a city, and that it was in possession and had authority to enter the property, regardless of whether they had pleaded such a defense.—TACOMA LIGHT & WATER CO. v. HUSON, Wash., 42 Pac. Rep. 536.

120. TRIAL — Evidence — Objection to Evidence.—Though a mere general offer to prove certain facts is an improper method of presenting offered evidence, and should not be allowed except by consent of counsel, where the objection to such an offer is not on the ground that the offer is an improper method, it will be presumed that the method used was by consent.—BIDDICK v. KOBLER, Cal., 42 Pac. Rep. 578.

121. TRIAL—Inspection of Documents.—The practice in the federal courts in relation to the inspection of papers for the purpose of aiding a party in preparing for trial, as distinguished from inspection of papers "to be used on the trial," in respect to which an act of congress applies, is regulated by the practice prevailing in the State courts.—FRESCOLE v. CITY OF LANCASTER, U. S. C. C. (Penn.), 70 Fed. Rep. 337.

122. TROVER. — Where the title to goods sold remained in the vendor, the vendees can maintain trover for the conversion thereof by others, though at the same time there was an action pending by the vendors against defendants for the same cause.—ALDRICH v. HODGES, Mass., 42 N. E. Rep. 107.

123. TRUST DEED — Rights of Non-accepting Beneficiaries.—Where some of the beneficiaries in a trust deed refuse to accept its terms, and attach and convert the property conveyed by it, they cannot, in an action for such conversion by the trustee, assert any rights under the deed, or justify their taking to the extent of the interest intended by the grantor to be vested in the trustee for them.—WHITE v. STERZING, Tex., 32 S. W. Rep. 909.

124. WATERS — Navigable Waters — Harbor Lines.—Under Const. art. 15, § 1, providing for the establishment of harbor lines by the board of harbor commissioners, in navigable waters, in front of "cities," and section 3, providing that "municipal corporations" shall have the right to extend their streets over the intervening tide lands, the board has power to establish harbor lines in front of "towns," and therefore act March 21, 1895, providing for the disestablishment of harbor lines in front of "towns," is unconstitutional.—WILSON v. BOARD OF STATE LAND COM'RS., Wash., 42 Pac. Rep. 524.

125. WILL—Contest—Evidence.—On the contest of a will between the half-brother of decedent and a cousin, evidence of a feud between the father of testator and his brothers, in which testator was supported by the cousin, is inadmissible as showing a motive for providing more liberally for the cousin than for the half-brother.—TURNER'S GUARDIAN v. KING, Ky., 32 S. W. Rep. 941.

126. WILL — Provision for Children. — A will of a married woman who dies leaving a child, giving all of her property to her husband, and providing that, if he should marry again after her death, all her property is to belong to her child or children, does not provide for her child or children, within the meaning of 2 Hill's Code, § 1465, providing that the children must be named or provided for in the will in order to be valid as to such children.—PURDY v. DAVIS, Wash., 42 Pac. Rep. 520.

127. WILL—Trust Estate—Infant—Remainder-men.—Testatrix left land in trust for her son for life, with remainder to his children or their descendants living at his death, and, in default of such issue, to other specified devisees: Held, that the son's first-born took at its birth a vested estate in remainder, subject to open and let in after-born children; such vested remainder becoming a fee-simple in the children living at the death of their father.—LOSEY v. STANLEY, N. Y., 42 N. E. Rep. 8.

128. WITNESS — Credibility.—A witness may, for the purpose of affecting his credibility, be asked on cross-examination if he had not been indicted for embezzlement and perjury, though an indictment 10 years before might be objected to as too remote.—LINZ v. SKINNER, Tex., 32 S. W. Rep. 915.